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The Terrorism Bar: An Analysis of Potential Modifications to the Tier III and Related Inadmissibility Provisions

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The Terrorism Bar

An Analysis of Potential Modifications to the Tier III and Related Inadmissibility Provisions

Margaret L. McCarthy

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Abstract: This research analyzes numerous proposals to modify the Tier III and related inadmissibility provisions in the Immigration and Nationality Act which have been recommended since the latest relevant legislative changes in 2007. Using the most common criticisms of the Tier III and related inadmissibility provisions to measure potential impact of the proposals, as well as Congressional and Federal opinion of the Tier III inadmissibility in general, this project will aim to decipher which of the proposals has the greatest potential to be enacted. In the end, this analysis recommends first the institution of expanded waiver/exemption authority for relieving individuals or groups of the Tier III and related inadmissibility provisions, followed by the institution of the statutory reform corresponding to the most successfully implemented waivers.

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During the 1970s and early 1980s, the African National Congress (ANC)—leading organization in the South African anti-apartheid movement and led by Nelson Mandela—was classified as a terrorist organization by the U.S. government. By 1986 the U.S. Congress was issuing resolutions calling for Nelson Mandela’s release from prison.¹ Several decades later, the counterterrorism immigration terms of the USA PATRIOT Act again implicated Mandela as a terrorist under the inadmissibility provisions of the Immigration and Nationality Act (INA). These provisions required Mandela to receive special permission to travel to the United States by virtue of his involvement in the ANC, classified as an “undesigned” or “Tier III” terrorist organization via the PATRIOT Act’s modifications to the INA. Senator Judd Gregg of New Hampshire called Mandela’s inclusion in the Tier III inadmissibility a “bureaucratic snafu.”² The fact remains however, that Nelson Mandela was for a short time officially denied admissibility to the United States by U.S. immigration law. Many other individuals—some living in the U.S. for decades and applying for citizenship, others seeking asylum, others simply attempting to immigrate—have been barred by the same statutes. So is this indeed an instance of bureaucratic snafu? Is it a matter of nascent legislation working through early idiosyncrasies? Or is Nelson Mandela’s case evidence of a greater, systemic issue with the provisions of the INA? This project seeks to answer these questions.

¹ Kidane, Won. (2010.) “The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom and the United States: Transporting Best Practices.” *Fordham International Law Journal*. Vol. 33: 365.

² Hall, Mimi. 2008. “U.S. has Mandela on terrorist list.” *USA Today*. April 30, 2008.

I. Introduction

The terrorism-related inadmissibility grounds (TRIG), found in §212(a)(3)(B) of the Immigration and Nationality Act (INA), are the mechanism by which the U.S. government is able to bar terrorist organizations and those inciting terrorist activity from entry into the United States. As a result of modifications to the INA by the USA PATRIOT Act of 2001, the TRIG provisions divide the classification of a terrorist organization into three levels, or tiers, the third of which is the subject of this analysis. Tier III defines an “undesigned” terrorist organization as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the [terrorist] activities described in subclauses (I) through (VI) of clause (iv).”³ These activities include: to commit or incite to commit, to plan or prepare, to gather information for, or to solicit funds for a terrorist activity or terrorist organization, or to solicit an individual to engage in this conduct or for membership to a Tier I, II, or III terrorist organization, or to commit an act the actor reasonably should know affords material support to a Tier I, II, or III terrorist organization or activity.⁴

The Tier III provision, especially in combination with the material support clause of the INA (as amended by the Real ID Act of 2005) has come under harsh criticism from the policy and academic communities alike for being fundamentally too broad and indiscriminate in its applicability. Others argue that the breadth of the provisions is necessary for the maximization of discretionary authority of government officials. As a result of the debate, several proposals for changes to the statutes and their execution have been recommended. This project is undertaken in reaction to these proposed modifications.

³ Immigration and Nationality Act. 8 U.S.C. 1182 §212(a)(3)(B)(vi)(III).

⁴ Immigration and Nationality Act. 8 U.S.C. 1182 §212(a)(3)(B)(iv).

The value of this study is in its synthesis of these proposals, which are made by a variety of sources in conjunction with various arguments about the justice and equity of the TRIG provisions and related issues. The proposals are often made as part of a list of varied, independent potential changes, as part of several changes recommended together, or embedded in a broader exploration of terrorism and immigration issues. The proposals have not, until this point, been discussed in comparison to one another, nor has their potential impact been evaluated individually with respect to a pre-defined criterion. This study thus contributes an initial, comparative analysis of the proposals which may be used for consideration of the proposals in future policymaking and academic work.

This project will specifically consider eight such proposals in the context of an “adoption→implementation→impact” framework. This simple framework allows the project to consider discretely the potential effects (impact) of the proposals separate from their ability to be enacted (adoption). The eight proposals to be considered are:

1. *No modification to the application of Tier III, nor to the current process of adjudicating cases and waiver issuance.*
2. *Modification of the exemption/waiver processes via expanded categories or authority for issuing of exemptions/waivers.*
3. *Creation of a de minimis level of material support or of a more restricted definition of material support to terrorist organizations.*
4. *Creation of an exception for material support provided under duress.*
5. *Introduction of the elements of “intent” and/or representation of a threat to national security into the Tier III provision.*
6. *Do not apply the Tier III provision retroactively, that is to groups which have given up terrorist activities or for activities which ceased prior to the enactment of the relevant legislation.*
7. *Introduction of a “designated” list of Tier III terrorist organizations.*
8. *Removal of the Tier III provision.*

The project firstly culls the key criticisms of the Tier III and related provisions from literature and public comment. The three primary criticisms are then used as the criterion against which the impact of the proposals is evaluated. These criticisms are: that the Tier III definition of

an undesignated terrorist organization itself is too broad, that the TRIG provisions as amended by the USA PATRIOT Act and the Real ID Act present unfair and largely inadvertent bars to refugees and asylum seekers, and that the provisions have resulted in a crippling bureaucratic backlog of immigration cases qualifying for TRIG inadmissibility. The “impact” piece of the analysis considers theoretically whether each proposal, if implemented, would affect these three criticisms. This constitutes the bulk of this project’s analysis. Such a discussion is mainly theoretical, as no world exists where each proposal could be implemented and then measured for its effects. The consideration of a proposal’s impact is done by comparing the content of the proposal to the content of the TRIG provisions currently, and then extrapolating out to estimate the effects of the modifications.

The analysis finally briefly considers the “adoptability” of the proposals given the political context and the limitation/sanction of discretionary authority which the proposal entails. The brief consideration of adoptability is meant to ground the feasibility of implementing the proposals as explored in the “impact” analysis.

Ultimately, this project puts forth the recommendation that Proposal 2 for modification of the exemption/waiver processes be enacted immediately. Additionally, after sufficient time for considering its success has occurred, and if the imposition of Proposal 2 has been successful, this project recommends the institution of other proposals whose provisions correspond to the expanded waiver/exemption authority in Proposal 2. Thus those conditions for which waivers have been extended and which have been politically and strategically successful can be made permanent by their institution in the statutory language or standard interpretation of the TRIG provisions.

II. Defining Terrorism

Almost every project relating to terrorism—its perpetrators, its occurrence or its effects—will address the ongoing effort to define it; this paper is no exception. Here it is critical to begin by exploring currently accepted definitions of terrorism, since the subject of the debate is fundamentally about the acceptability of a single one: the Tier III definition of an “undesigned terrorist organization.” Resolving the question of what is or should be the accepted definition of terrorism in the academic or policy communities is not the purpose of this discussion, nor of this project in its entirety. Nor is it the purpose of the Tier III definition of a terrorist organization to reconcile these contending definitions. The following discussion is namely included to provide points of comparison for the subsequent discussion of recommendations to modify the Tier III provision, and to provide a basis from which the claims of Tier III over-breadth can be considered to come.⁵

There is no internationally accepted definition of terrorism, though several pieces of international legislation have come close to defining it. The Terrorism Convention of 1937, while it did not present a definition of terrorism, gave examples of acts which could be considered terrorism, including: willful acts causing death or bodily injury to Heads of States, willful damage to public property, or willful endangerment of public lives.⁶ More recently, in 1999 the International Convention for the Suppression of the Financing of Terrorism was adopted by the United Nations General Assembly. It comes close to offering a definition of terrorism, saying:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds

⁵ See the *Quick Reference: Definitions of Terrorism* Table II.1 at the close of this section.

⁶ Kidane, Won. (2010.) “The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom and the United States: Transporting Best Practices.” *Fordham International Law Journal*. Vol. 33: 311.

with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
[...]

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁷

It is worth noting that both of these conceptualizations of terrorism limit the definition in a way which the Tier III definition does not, and that is through the inclusion of motivation.

There is also no official U.S. government definition of terrorism, but instead each agency utilizes its own. Presumably, the adherence to different principles and organizational goals is what has resulted in the varied definitions of “terrorism” and “terrorist activity.”

Hoffman (2006) argues that each of the Federal definitions is created with the goals of the specific agency in mind. For instance, the Department of State (DOS) uses the definition contained in the Foreign Relations Appropriations Act, Fiscal Years 1988 and 1989. It states that terrorism is “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”⁸ The Department of Justice (DOJ) utilizes the same definition.⁹ This definition focuses on the substate nature of the actors as well as the noncombatant nature of the victims. Such serves to alleviate intergovernmental pressure on the State Department and to make use of the international definition of noncombatant, which includes off-duty military personnel.¹⁰

The Department of Homeland Security (DHS) definition focuses on the national security infrastructure and is less outward looking than the definition adopted by DOS and DOJ. It

⁷ UN General Assembly. *International Convention for the Suppression of the Financing of Terrorism*. 9 December 1999. (<http://www.un.org/law/cod/finterr.htm>).

⁸ Foreign Relations Authorization Act Fiscal Years 1988 and 1989. Pub. L. 100-204, 22 U.S.C. §2656f(d)(2).

⁹ Hoffman, Bruce. 2006. *Inside Terrorism*. New York: Columbia University Press: 31.

¹⁰ *Ibid*, 32.

defines terrorism as: “any activity that involves an act that: is dangerous to human life or potentially destructive of critical infrastructure or key resources; and...must also appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”¹¹

Despite the differences in these definitions, for the purposes of immigration law, the definitions of “terrorist organization” and “terrorist activity” contained in the INA’s TRIG section are used by all three agencies: DOS, DOJ, and DHS. This represents a convergence with regard to immigration issues, but also a divergence from individual agency definitions which are utilized for purposes other than immigration.

Finally, the Department of Defense (DOD) employs the following definition of terrorism: “the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological objectives.”¹² Hoffman argues that this definition is the most complete given its inclusion of motive, violence, and fear.¹³

Unsurprisingly, given the varied nature of international and U.S. government definitions of terrorism, academic definitions vary widely as well. Perhaps the most widely cited effort to define terrorism is Schmid and Jongman’s six-hundred page text, which begins by measuring the frequency of certain word elements in 109 different definitions of terrorism. Schmid and Jongman (1988) find the elements of “violence, force” to be the most common component followed by “political,” “fear, terror emphasized,” “threat,” “(psych.) effects and (anticipated) reactions,” “victim-target differentiation,” and “purposive, planned, systematic, organized action”

¹¹ *Ibid*, 31.

¹² *Ibid*.

¹³ *Ibid*.

to be the most common. Their own lengthy definition produced as a result of their research includes only 16 of the 22 elements, though not the most frequently identified 16.^{[14][15]} This points to the inherent misalignment of theirs and others' definitions, as well as the difficulty in creating a single authoritative definition. Albeit the first sentence of the book notes that "the search for an adequate definition of terrorism is still on."¹⁶

Nearly two decades later, Hoffman (2006) criticizes Schmid and Jongman's lack of a definitive conclusion, and aims to define terrorism primarily by differentiating it from other types of violence. He conclusively defines terrorism as:

- ineluctably political in aims and motives;
- violent—or, equally important, threatens violence;
- designed to have far-reaching psychological repercussions beyond the immediate victim or target;
- conducted either by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia) or by individuals or a small collection of individuals directly influenced, motivated, or inspired by the ideological aims or example of some existent terrorist movement and/or its leaders; and
- perpetrated by a subnational group or nonstate entity.^{[17][18]}

Grant Wardlaw (1989) similarly defines political terrorism as "the use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and/or fear-inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to

¹⁴ Schmid, Alex P. and Albert J. Jongman. 1988. *Political Terrorism*. New York: North-Holland Publishing Company: 28.

¹⁵ Please see *Quick Reference* chart for full definition.

¹⁶ Schmid, Alex P. and Albert J. Jongman. 1988. *Political Terrorism*. New York: North-Holland Publishing Company: Chapter 1.

¹⁷ Hoffman, Bruce. 2006. *Inside Terrorism*. New York: Columbia University Press: 43.

¹⁸ Hoffman also importantly notes that no terrorist would identify himself as such, as a criminal would. "The terrorist...will never acknowledge that he is a terrorist and moreover will go to great lengths to evade and obscure any such inference or connection." The assertion that terrorists are resistant to identify themselves represents an interesting irony with regard to immigration law. Immigrants applying for status in the U.S. are required to disclose anything which might make them ineligible for admission, and so most individuals barred by the TRIG provisions have effectively labeled themselves as terrorists or as complicit in terrorist activity.

the political demands of the perpetrators.”¹⁹ His definition differs from Hoffman’s in that it does not require that terrorism to be perpetrated by an organized group. However, Wardlaw’s definition does include elements of threat and psychological repercussions common to Hoffman’s definition.

In summary, each academic definition includes 1) the element of violence or threat thereof, 2) political motives (Schmid and Jongman also include criminal or other, idiosyncratic purposes as valid motives), and 3) effects beyond just the immediate victim. The Federal definitions above are each in general agreement with at least two of these elements (the DOS and DOJ 1 and 2; DHS with all three; DOD with 1, 2, and likely 3). The 1999 International Convention’s definition is in agreement with each of 1) – 3), and both international definitions additionally include elements of intent.

Important to note is that each definition is in distinct disagreement about the perpetrators of the terrorist activity. Hoffman’s terrorism is perpetrated by “an organization with an identifiable chain of command ...or by individuals or a small collection of individuals.” Wardlaw’s terrorism is carried out simply by “an individual or a group,” and the 1999 International Convention merely requires that the act be committed by a “person.” Schmid and Jongman’s terrorism is committed by “(semi-)clandestine individual, group, or state actors.” None of the Federal working definitions of terrorism allude to the group which carries it out except for DOS’s definition which, in contrast to Schmid and Jongman’s allowance of state perpetrators, requires the action to be undertaken by substate actors or clandestine agents. Thus it is in the conceptualization of the group that commits terrorism where there is the greatest

¹⁹ Wardlaw, Grant. 1982. *Political Terrorism: Theory, tactics, and counter-measures*. New York: Cambridge University Press: 16.

disagreement among contending definitions. It is therefore unsurprising that heated debate has ensued over the INA’s definition of a terrorist organization.

Each of the above definitions, while specific in its own right, is arguably much narrower than the Tier III definition of a terrorist organization contained in the INA: “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in...”²⁰ the incitement of, preparation or solicitation for, execution of, or material support to a terrorist activity or organization.²¹ The ambiguity in the Tier III definition leaves room to debate the “terrorist” nature of the groups in question, and indeed leads us to the discussion of the criticisms of the Tier III and related terrorism-related inadmissibility provisions around which this paper is centered.²²

Table II.1

Quick Reference: Definitions of Terrorism	
International	
Terrorism Convention of 1937	Examples of terrorism include: willful acts causing death or bodily injury to Heads of States, willful damage to public property, or willful endangerment of public lives.
International Convention for the Suppression of the Financing of Terrorism (1999)	“1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: [...] (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”
U.S. Government	
Departments of State and Justice (Foreign Relations Appropriations Act, Fiscal Years 1988 and 1989)	“premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”

²⁰ Immigration and Nationality Act. 8 U.S.C. 1182 §212(a)(3)(B)(vi)(III).

²¹ Immigration and Nationality Act. 8 U.S.C. 1182 §212(a)(3)(B)(iv).

²² See Appendix 1 for a discussion of the prevailing definitions of a Social Movement, which can be argued to coincide at least as closely to the Tier III definition of a terrorist organization as do these prevailing definitions of terrorism.

Department of Homeland Security	“any activity that involves an act that: is dangerous to human life or potentially destructive of critical infrastructure or key resources; and...must also appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”
Department of Defense	“the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments of societies in the pursuit of goals that are generally political, religious, or ideological objectives.”
Academic	
Schmid and Jongman (1988)	“Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-)clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.”
Wardlaw (1989)	“the use, or threat of use, of violence by an individual or a group, whether acting for or in opposition to established authority, when such action is designed to create extreme anxiety and/or fear-inducing effects in a target group larger than the immediate victims with the purpose of coercing that group into acceding to the political demands of the perpetrators.”
Hoffman (2006)	“Terrorism is: ineluctably political in aims and motives; violent—or, equally important, threatens violence; designed to have far-reaching psychological repercussions beyond the immediate victim or target; conducted either by an organization with an identifiable chain of command or conspiratorial cell structure (whose members wear no uniform or identifying insignia) or by individuals or a small collection of individuals directly influenced, motivated, or inspired by the ideological aims or example of some existent terrorist movement and/or its leaders; and perpetrated by a subnational group or nonstate entity.”
Tier III	
§212 (a)(3)(B) of the Immigration and Nationality Act	“a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the [terrorist] activities described in subclauses (I) through (VI) of clause (iv),” including: to commit or incite to commit, to plan or prepare, to gather information for, or to solicit funds for a terrorist activity or terrorist organization, or to solicit an individual to engage in this conduct or for membership to a Tier I, II, or III terrorist organization, or to commit an act the actor reasonably should know affords material support to a Tier I, II, or III terrorist organization or activity.

III. Legislative Chronology

While many laws published before and after September 11, 2001 have had an effect on how the country views and deals with terrorism in the context of immigration policy, several are more important for the evolution of the Tier III and related inadmissibility clauses in U.S. immigration law today. These are explored here.

Table III.1

Title	Issue Date	Public Law Number, U.S. Code/Statutes at Large Address; relevant section	Relevant Effect with Respect to the Tier III and Related Provisions
McCarran-Walter Act; Immigration and Nationality Act (INA)**	December 24, 1952	Primarily Chapter 8 U.S.C.	Assembled the foundations of existing immigration policies and legal practices; governs individuals applying to enter the U.S. and persons applying for changes of immigration status from within or outside of the U.S.
Anti-Terrorism Act of 1987 (Foreign Relations Authorization Act Fiscal Years 1988 and 1989)	December, 22 1987	Pub. L. 100-204, 22 U.S.C.; § 2656f(d)(2)	Established the requirement for the U.S. Department of State's annual submission of country reports on terrorism to Congress. Such includes details of terrorist groups active that year.
Immigration Act of 1990	November 29, 1990	Pub. L. 101-649, 104 Stat. 4978; §601	Revised the grounds for exclusion in the INA to include inadmissibility on the grounds of participation in a terrorist organization or a terrorist activity.
Antiterrorism and Effective Death Penalty Act of 1996	June 3, 1996	Pub. L. 104-132, 110 Stat. 1214; §302	Amended the INA to include §219, codifying the Secretary of State's authority to designate a foreign terrorist organization (in addition to the Attorney General and consulates' existing authority to label and individual inadmissible for participation in terrorist activities).
Executive Order 13224	September 23, 2001	Title 31 Part 595 U.S. Code	Established that the Departments of State or of the Treasury may designate "a wider range of entities, including terrorist groups, individuals acting as part of a terrorist organization, and other entities such as financiers and front companies, [...] as Specially Designated Global Terrorists (SDGTs)."

Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)	October 26, 2001	Pub. L. 107-56, 115 Stat. 272; §411	Overhauled the terrorism inadmissibility language of the INA by adding the Tier II and Tier III definitions of terrorist organization and amending the “terrorist activity” language.
Intelligence Reform and Terrorism Prevention Act of 2004	December 17, 2004	Pub. L. 108-458, 118 Stat. 3638; §7119	Amended the process for designation and re-designation of Foreign Terrorist Organizations.
Real ID Act of 2005	May 11, 2005	Pub. L. 109-13, 119 Stat. 302; §103	Amended the material support provision of “engagement in terrorist activity” in §212 of the INA.
Consolidated Appropriations Act (CAA)	December 26, 2007	Pub. L. 110-161, 121 Stat. 1844; §691 (a) and (b)	Expanded the Secretary of State’s waiver authority in §212(d)(3)(B)(i) to be able to determine the inadmissibility bar inapplicable in certain cases. Applied automatic relief of the §212(a)(3)(B) provisions for “the Hmong and other groups that do not pose a threat to the United States”
Exemption of African National Congress from Treatment as Terrorist Organization for Certain Acts or Events Public	July 1, 2008	Pub. L. 110-257, 122 Stat. 2426	Amended §691(B) of the CAA to include the African National Congress, exonerating any “alien with respect to activities undertaken in association with the African National Congress in opposition to apartheid rule in South Africa.”

*Information available from the United States Citizenship and Immigration Services, “Public Laws Amending the INA” web page <<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=0c829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnnextchannel=0c829c7755cb9010VgnVCM10000045f3d6a1RCRD>>

In October 2001, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act, Pub. L. 107-56) overhauled the terrorism-related inadmissibility language originally placed in the INA by the Immigration Act of 1990. While the law previously recognized five categories of terrorism-related inadmissibility, the USA PATRIOT Act added three more, including: “espousing terrorist activity, being the spouse or child of an inadmissible alien associated with a terrorist

organization, and intending to engage in activities that could endanger the welfare, safety or security of the United States.”²³ The USA PATRIOT Act also amended the INA clause defining “terrorist activity,” which currently reads:

- (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any-
 - (aa) biological agent, chemical agent, or nuclear weapon or device, or
 - (bb) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.²⁴

More directly relevant to this study, the USA PATRIOT Act amended the clause defining a terrorist organization. The INA provision currently reads:

- (vi) **TERRORIST ORGANIZATION DEFINED-** As used in this section, the term 'terrorist organization' means an organization-
 - (I) designated under section 219;
 - (II) otherwise designated, upon publication in the Federal Register, by the Secretary of State in consultation with or upon the request of the Attorney General or the Secretary of Homeland Security, as a terrorist organization, after finding that the organization engages in the activities described in subclauses (I) through (VI) of clause (iv); or
 - (III) that is a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the activities described in subclauses (I) through (VI) of clause (iv).²⁵

Groups labeled terrorist organizations by subclauses I, II, and III of §212 (a)(3)(B)(vi) are commonly referred to as Tier I (Foreign Terrorist Organizations), Tier II, or Tier III organizations, respectively. The Tier I designation is the most familiar, and requires that the

²³ Doyle, Charles. 2002. The USA PATRIOT Act: A Legal Analysis. (April 15.) *Congressional Research Service*.

²⁴ Immigration and Nationality Act. 8 U.S.C. 1182 §212(a)(3)(B)(iii).

²⁵ Immigration and Nationality Act. 8 U.S.C. 1182 §212(a)(3)(B)(vi).

organization be a foreign organization, that it be engaged in the terrorist activities described above, and that it represent a threat to U.S. national security.²⁶ The Tier III (§212(a)(3)(B)(vi)(III)) definition of a terrorist organization is the most general of the three, and is the primary subject of this analysis. It defines a terrorist organization widely, not requiring any pre-determined size or specific organizational structure, nor any specified motivation or effect of the activities and goals of the organization.

The TRIG provisions may be applied to individuals applying for entry into the U.S. or to individuals already in the U.S. applying for changes of immigration status. Because the provisions do not specify and because they have not been interpreted to apply to activities undertaken only after a certain date, the Tier III provision can feasibly apply to any organization ever performing a function encompassed by its definition. Therefore the Tier III provision was enacted on the date of the passing of the USA PATRIOT Act for any activities of organizations qualifying as undesignated terrorist organizations carried out prior to the legislation. For activities occurring after October 26, 2001, the provision is applicable on the date of the activity, though usually will not be relevant until an individual participant is applying for immigration privileges and the inadmissibility is discovered and applied.

Notable is the fact that subclauses II and III, the newest definitions of terrorist organizations resulting from the PATRIOT Act, were not added to the definition of a designated Foreign Terrorist Organization in INA §219, but directly into the §212 inadmissibility provisions. This means that they are not grounds to be added to the official list of Foreign Terrorist Organizations designated by the Secretary of State. By being added instead to §212, the two subclauses merely create additional grounds for inadmissibility of persons applying for

²⁶ (2010) "Foreign Terrorist Organizations." U.S. Department of State. November 24, 2010. Accessed April 3, 2011 <<http://www.state.gov/s/ct/rls/other/des/123085.htm>>.

immigration privileges or changes in immigration status. Furthermore, there is no list of terrorist organizations deemed such by subclause III, and as a result Tier III terrorist organizations are conventionally called “undesigned terrorist organizations.” (Tier II designations are published in the Federal register.²⁷) Tier III is usually “discovered” on an ad hoc basis by consular and immigration officials processing immigration cases, and is enacted by the official decision of a principal or an individual with the principal’s delegated authority.²⁸ Thus the determination and application of the Tier III provision requires significant administrative effort, but allows for maximum discretion of bureaucrats and case workers in applying the provision. That is, because of the breadth of the definition and the lack of a list, the definition can be liberally interpreted for the purposes of barring individuals and groups to whom other inadmissibility provisions may not be directly or efficiently applied.

Directly relevant to the widened grounds considered to constitute membership to a terrorist organization is the INA’s definition of “material support” provided to terrorist organizations, also part of TRIG. Though the material support provision has existed in the INA since 1990, the Real ID Act of 2005 made the provision stricter by relaxing the *mens rea* requirement and limiting waiver availability for individuals providing material support to terrorist organizations.²⁹ The more stringent material support bar of the Real ID Act, in combination with the additional definitions of terrorist organization from the USA PATRIOT Act, begets a much greater number of individuals considered inadmissible for material support,

²⁷ Kidane, Won. (2010.) “The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom and the United States: Transporting Best Practices.” *Fordham International Law Journal*. Vol. 33: 320.

²⁸ 9 *Foreign Affairs Manual* (FAM) 40.32 N5

²⁹ Fleming, Mark, Emi McLean and Amanda Taub, eds. (2006) “Unintended Consequences: Refugee Victims of the War on Terror.” Georgetown University Law Center Human Rights Institute Refugee Fact-Finding Mission. May 2006.

as the bar itself becomes less forgiving and the number of organizations to which it applies expands.

The material support provision, under the INA’s definition of “engagement in terrorist activity,” reads “to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training...”³⁰ to a terrorist activity or organization. (The material support provision is directly connected to the Tier III provision, as it is subclause (VI) of “the activities described in subclauses (I) through (VI) of (iv)”³¹ in which Tier III groups take part.) Notably, this is not an exhaustive list of types of material support for which an individual can be considered inadmissible. It is merely a list of examples which may be considered material support.

Additionally, the Real ID Act instituted language requiring that an individual be able to demonstrate by “clear and convincing evidence that he did not know, or should not reasonably have known that the organization [for which he was soliciting funds, things of value, or individuals] was a terrorist organization.”³² The addition of “clear and convincing evidence” places the burden of proving non-involvement on the applicant. Immediately following the material support clause in the INA is a written exception to the material support bar which allows the Attorney General or the Secretary of State, in consultation with one another, to determine the

³⁰ Immigration and Nationality Act. 8 U.S.C. 1182 §212(a)(3)(B)(iv)(VI).

³¹ Immigration and Nationality Act. 8 U.S.C. 1182 §212 (a)(3)(B)(vi)(III).

³² Real ID Act of 2005. Pub. L 109-13, 119 Stat. 302 §103.

material support clause inapplicable to an alien. This exception authority is, in effect, a foreshadowing of the subsequent establishment of waiver authority.³³

Importantly, there are several more solidified and authoritative exemption/waiver authorities which developed after the 2005 adjustments to the INA. These enable U.S. government authorities to determine the inadmissibility inapplicable in certain cases—generally when a ‘totality of the circumstances’ warrants such a determination. When the exemptions/waivers are for entire groups, they are called “categorical, and when they are exercised for an individual they are referred to as “individual” waivers and exemptions. The authorities are currently: the authority to waive the TRIG statutes’ invocation or to exempt individuals from many of the TRIG provisions (individual), the authority to exempt entire groups from the Tier III provision (categorical), and the authority to waive the material support provision or to exempt individuals providing material support to certain organizations and individuals engaged in terrorist activity (categorical or individual).³⁴ In the following explanation and subsequent analysis, “waiver authority” will refer to the ability to admit an individual or group for whom the Tier III and related provisions apply. “Exemption authority” will refer to the authority to determine the bar inapplicable in a particular case.³⁵ This is consistent with convention.

Individual waivers are requested and obtained during immigration processing either during the application or immigration court proceedings, and must be requested from DHS. Categorical waivers are generally developed through an interagency process to determine the bar

³³ Georgetown University Law Center Human Rights Institute’s 2006 Refugee Fact-Finding Investigation considers this provision “impracticable,” which could explain the question of the redundancy in the production of a material support exemption/waiver authority.

³⁴ 9 FAM 40.32 N5; United Nations High Commissioner for Refugees. 2006. “Material Support” and Related Bars to Refugee Protection: Summary of Key Provisions of the Immigration and Nationality Act (INA). <http://www.rcusa.org/uploads/pdfs/ms-summ-unhcrkeyprov12-06.pdf> (March 30, 2011) : 4.

³⁵ According to the Foreign Affairs Manual, the “exemption authority” is distinct from the “waiver authority” by way of the waiver authority’s applicability to Non-immigrant Visa cases.

inapplicable to the particular group which has been labeled Tier III in individuals' immigration cases. Exemptions are similarly issued through interagency consultation to determine in which cases the particular bar is inapplicable, and thus is in some ways are more amendable to categorical issuance. Subsequent to the institution of a waiver/exemption, individuals formerly inadmissible by TRIG authority are no longer barred if they meet the statutory requirements of the exemption. The following is a description of the evolution of the current waiver/exemption authority.

In 2008, the Consolidated Appropriations Act (CAA, Pub. L. 110-161) expanded the waiver authority, contained in §212(d)(3)(B)(i), to enable the Secretaries of State or Homeland Security to waive the application of the Tier III inadmissibility to entire groups and individuals associated with the group or groups' supposed terrorist activity.³⁶ Thus §691(A) of the CAA reads:

The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may determine in such Secretary's sole unreviewable discretion that subsection (a)(3)(B) shall not apply with respect to an alien within the scope of that subsection or that subsection (a)(3)(B)(vi)(III) shall not apply to a group within the scope of that subsection...³⁷

The provision also does not apply to an individual who has

voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a terrorist organization that is described in subclause (I) or (II) of subsection (a)(3)(B)(vi), and no such waiver may be extended to a group that has engaged terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians.³⁸

³⁶ Garcia, Michael John and Ruth Ellen Wasem. 2010. Immigration: Terrorist Grounds for Exclusion and Removal of Aliens. (January 12.) *Congressional Research Service*.

³⁷ Consolidated Appropriations Act Pub. L. 110-161, 121 Stat. 1844 §691.

³⁸ *Ibid.*

§691(B) of the CAA is the utilization of this waiver authority. It applies automatic relief of the §212(a)(3)(B), terrorist organization inadmissibility provisions for “the Hmong and other groups that do not pose a threat to the United States,” saying:

For purposes of section 212(a)(3)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)), the Karen National Union/Karen Liberation Army (KNU/KNLA), the Chin National Front/Chin National Army (CNF/CNA), the Chin National League for Democracy (CNLD), the Kayan New Land Party (KNLP), the Arakan Liberation Party (ALP), the Mustangs, the Alzados, the Karenni National Progressive Party, and appropriate groups affiliated with the Hmong and the Montagnards shall not be considered to be a terrorist organization on the basis of any act or event occurring before the date of enactment of this section.³⁹

The CAA thus had several basic effects: it granted eligibility to groups previously inadmissible, including members and representatives of Tier III terrorist organizations, persons who have engaged in terrorist activities of Tier III groups, and persons who may have engaged in terrorist activity unknowingly. The CAA waiver authority is categorical, as it makes entire groups eligible for relief from the Tier III inadmissibility.⁴⁰

Official exemptions were published in the Federal Register on June 18, 2008 for each of the ten groups included in §691(B).⁴¹ The individuals covered by the Federal Register exemptions and applying for immigration status must also be able to prove to the authority adjudicating their case that

the alien (a) Is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection; (b) has undergone and passed relevant background and security checks; (c) has fully disclosed, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of each activity or association falling within the scope of section 212(a)(3)(B) of the INA; (d) poses no danger to the safety and security of the United

³⁹ *Ibid.*

⁴⁰ Garcia, Michael John and Ruth Ellen Wasem. 2010. Immigration: Terrorist Grounds for Exclusion and Removal of Aliens. (January 12.) *Congressional Research Service*.

⁴¹ Exercise of Authority Under Sec. 212 (d)(3)(B)(i) of the Immigration and Nationality Act 73 Fed Reg 118 (June 18, 2008).

States; and (e) is warranted to be exempted from the relevant inadmissibility provision by the totality of the circumstances.⁴²

Public Law 110-257 amended §691(B) of the CAA to include the ANC, exonerating any “alien with respect to activities undertaken in association with the African National Congress in opposition to apartheid rule in South Africa”⁴³ from the Tier III provision. It specifically urged the Secretaries of State and Homeland Security to immediately take any action necessary “to exempt the anti-apartheid activities of aliens who are current or former officials of the Government of the Republic of South Africa [from the definition of “terrorist organization” in §212(a)(3)(B) of the INA].”⁴⁴

Discussions for further categorical waivers and exemptions continue. Similar to the contentious debates over the barring of the ANC officials under Tier III, heated discussions concerning the finding of Tier III inadmissibility for several Iraqi groups have developed in the academic and policy communities. In 2009, the exemption authority was exercised to excuse the Iraqi National Congress, the Kurdistan Democratic Party, and the Patriotic Union of Kurdistan from the provisions of §212 (a)(3)(B).⁴⁵ As recently as December 2010, DHS Secretary Janet Napolitano exercised her authority to exempt the All Burma Students’ Democratic Front for qualification as a Tier III, undesignated terrorist organization.⁴⁶

There is also an exemption authority for waiving the material support bar in INA §212 (d)(3)(B)(i), which was available prior to the Consolidated Appropriations Act. In 2006, this authority was exercised by Secretary of State Rice with regards to three groups of refugees:

⁴² Exercise of Authority Under Sec. 212 (d)(3)(B)(i) of the Immigration and Nationality Act 73 Fed Reg 118 (June 18, 2008).

⁴³ Exemption of African National Congress from Treatment as Terrorist Organization for Certain Acts or Events Public. Pub. L. 110-257, 122 Stat. 2426.

⁴⁴ *Ibid.*

⁴⁵ Refugee Council USA. (2004-2011) “Refugee Waivers.” Accessed April 2, 2011 <<http://www.rcusa.org/index.php?page=refugee-waivers>>.

⁴⁶ Human Rights First. (2010/2011.) “Asylum News-Winter, 2010/2011. Asylum Newsletter, 2010/2011. <http://www.humanrightsfirst.org/2011/01/28/90-winter-20102011/> (March 30, 2011).

“Burmese Karen individuals who had provided material support to the Karen National Union (KNU) or Karen National Liberation Army (KNLA), and for Chin Burmese refugees who provided material support to the CNF or Chin National Army (CNA).”⁴⁷ The authority was also exercised in 2007 to produce a waiver for material support provided to the following Tier III organizations: the Karen National Union/Karen National Liberation Army (KNU/KNLA), the Chin National Front/Chin National Army (CNF/CNA), the Chin National League for Democracy (CNLD), the Kayan New Land Party (KNLP), the Arakan Liberation Party (ALP), the Tibetan Mustangs, the Cuban Alzados, or the Karenni National Progressive Party (KNPP).⁴⁸

Also in 2007, working off the previous waivers of material support, Secretary of Homeland Security Chertoff “exercised his authority to waive the material support inadmissibility bar for certain aliens if the material support was provided under duress to an undesigned terrorist organization and the totality of the circumstances justified the favorable exercise of discretion, thus recognizing a new ‘duress exemption.’”⁴⁹ Initially unavailable to individuals providing material support under duress to Tier I or II organizations,⁵⁰ late in 2007 Secretary Chertoff exercised this authority in regards to material support provided to the Revolutionary Armed Forces of Colombia (FARC), the United Self-Defense Forces of Colombia (AUC), and the National Liberation Army of Colombia (ELN),⁵¹ all Tier I terrorist organizations.

⁴⁷ Alberty, Linda. (2008). “Affording Material Support to a Terrorist Organization—A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place.” *Immigration Law Advisor* 2(April) 4: 3.

⁴⁸ Refugee Council USA. (2004-2011) “Refugee Waivers.” Accessed April 2, 2011 <<http://www.rcusa.org/index.php?page=refugee-waivers>>.

⁴⁹ Alberty, Linda. (2008). “Affording Material Support to a Terrorist Organization—A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place.” *Immigration Law Advisor* 2(April) 4: 3.

⁵⁰ *Ibid.*

⁵¹ Refugee Council USA. (2004-2011) “Refugee Waivers.” Accessed April 2, 2011 <<http://www.rcusa.org/index.php?page=refugee-waivers>>.

Finally, a waiver authority exists for persons placed in removal proceedings after the finding of material support to a Tier III terrorist organization, though it is not specific to the TRIG bars. The authority for exercising such rests solely with the Secretary of Homeland Security,⁵² and is delineated in the INA §240.⁵³

In summary, this brief overview of the evolution of the Tier III inadmissibility provisions considered the INA's definition of an undesignated terrorist organization and the effect of the material support bar. The overview also covered the currently available, discretionary exemptions and waivers, which represent ad hoc remedies in cases where the inadmissibility is determined to be inapplicable for political, moral or other reasons. This overview of the INA's relevant TRIG provisions, in conjunction with the conventional definitions of terrorism discussed previously, will enable us to better understand the criticisms of the legislation and ultimately to recognize the value or lack thereof of proposed modifications to it.

⁵² United Nations High Commissioner for Refugees. 2006. "Material Support" and Related Bars to Refugee Protection: Summary of Key Provisions of the Immigration and Nationality Act (INA). <http://www.rcusa.org/uploads/pdfs/ms-summ-unhcrkeyprov12-06.pdf> (March 30, 2011): 4.

⁵³ Immigration and Nationality Act. 8 U.S.C. 1182 §240.

IV. Approach to Reviewing Proposals

Despite their recent emergence, the TRIG provisions have already come under harsh criticism in the international, academic, and policy communities. As a result, a proliferation of proposed changes to the legislation ranging from slight to drastic has developed. This research aims to centralize the discussion of these proposed changes. Where proposals are generally made as part of a discussion of a specific flaw of the Tier III and related inadmissibility provisions, and are made without much discussion of the proposals' effects, this project will bring together the array of proposals and evaluate their impact against common criteria—an approach yet to be undertaken by those recommending them. The proposed changes to the legislation to be explored here are:

1. *No modification to the application of Tier III, nor to the current process of adjudicating cases and waiver issuance.*
2. *Modification of the exemption/waiver processes via expanded categories or authority for issuing of exemptions/waivers.*
3. *Creation of a de minimis level of material support or of a more restricted definition of material support to terrorist organizations.*
4. *Creation of an exception for material support provided under duress.*
5. *Introduction of the elements of “intent” and/or representation of a threat to national security into the Tier III provision.*
6. *Do not apply the Tier III provision retroactively, that is to groups which have given up terrorist activities or for activities which ceased prior to the enactment of the relevant legislation.*
7. *Introduction of a “designated” list of Tier III terrorist organizations.*
8. *Removal of the Tier III provision.*

The proposals are considered in the order of least to most change to the statutory language of the Tier III inadmissibility in the INA. This is not a measure of impact, but merely reflects the method of change to the TRIG bars which the proposals entail.⁵⁴

⁵⁴ The proposals are arranged in order of no change, to interpretive changes or changes which affect the implementation of the TRIG provisions but not the language of 212(a)(3)(B), to changes directly affecting the statutory language in the INA. This is synonymous with “implementation,” as considered in this project.

The following analysis evaluates each of the proposals according to an “adoption→implementation→impact” framework. Such a framework is useful as it allows us to differentiate between various elements of the proposed legislation: how the content of a proposal effects the current state of the legislation (impact), in what form the legislation should/would necessarily occur to generate this effect (implementation), and whether or not the proposal itself is viable in the current policy community (adoption). Thus for each proposal, this analysis will consider whether the legislation is likely to be adopted, how it would be implemented, and what would be the impact of its enactment. Specifically, this research will proceed with a two-pronged approach, considering the framework above in reverse order, and grouping together “implementation” and “impact” in Section V Part C, and considering adoptability in Section V Part D.

Section V Part A and Part B establish the criteria against which the proposals will be evaluated. In Part A the research first gleans, from existing literature and public comment, the primary criticisms of the legislation to use as a backdrop for considering the proposals’ potential impact. These are: over-breadth of the definition of a Tier III terrorist organization, effective bars to refugee and asylum seekers, and an administrative backlog of immigration cases. Given that proposals are made in an effort to effect one criticism or another, comparative evaluation of the proposals’ ability to alleviate these alleged inadequacies is an appropriate starting point for this project. Section V Part B develops a rating scheme for the proposals in terms of their impact on each of the three criticisms. This allows the proposals to be more easily compared to one another, and more cleanly interpreted by advocating/opposing parties.

Section V Parts C and D make up the substantive analysis of the proposals. Part C analyzes the potential impact (of the “adoption→implementation→impact” framework) of each

of the proposals against the criticisms explored in Part A and using the rating scheme developed in Part B. For each proposal, Part C will consider firstly the content and reasoning of the proposal. It will then proceed to consider the potential effects of the proposed changes with respect to their ability to ameliorate the criticisms of the legislation.⁵⁵ Part C's analysis of the potential impact of the proposals constitutes the bulk of this analysis. The theoretical analysis is based on this project's consideration of the proposals, and is to some degree subject to interpretation. For each proposal, the potential impact will be considered based on the content of the proposal as compared to the current state of the Tier III and related provisions. Understanding the effects of Tier III currently (here considered in the form of the three key criticisms) as well as the changes to the content of Tier III by each proposal will allow us to extrapolate the effects of the proposals with regard to those three criticisms. This projects comparison of the proposals' impact is ultimately the most valuable contribution of this project to the literature.

Part C will also explain the implementation of the proposals, or step two in the “adoption→implementation→impact” framework. Implied by each proposal is a recommendation for a certain type of implementation: amendment to the legislation, directive of a principal, or creation of additional authority for an agency/principal (indeed this is the determinant of the order in which the proposals are explored). This recommendation is either implicit or explicit, but nonetheless intrinsic to the proposal as considered here. Certainly, if the policy proposal were to be made in the end, a far more detailed analysis of the strategy for implementation would be necessary. The official recommendation would have to consider in far greater depth how the change would be enacted: through what type of legislation, advanced by

⁵⁵ This methodological design means that Part C is inherently biased in considering the opinions of proponents of the legislation. Counterpoints will be addressed in Part D when the political viability of the proposals are evaluated.

which agencies, supported by which budgets and processes, etc. Such is not the goal of this analysis, which operates with a much more limited understanding of “implementation,” but would be valuable in further study and would be vital to actual policy development.

Part D of the analysis of the proposed changes will consider the “adoption” piece of the “adoption→implementation→impact” framework. Adoptability is considered to mean the potential for realization of the proposal, given its potential impact explored in Part C, in the context of the opinions of policymakers, agency officials, and other parties with a stake in the enactment of changes. The task of Part D is to isolate the opinions of policymakers, bureaucrats, and legislators which can feasibly lead us to believe that they would or would not support a certain proposal given its potential impact on the legislation. Part D complements Part C’s analysis. It grounds the acceptability of proposals in the wider policy community (not just those recommending the change) and should narrow the number of proposals which would be viable for recommendation.

Part D will utilize testimony from Senate Judiciary Committee hearings during the 110th and 111th Congresses.⁵⁶ The Senate Judiciary Committee hearings are used because this committee has jurisdiction over both the Departments of Homeland Security and Justice as well as over the issue of immigration. These transcripts are the most pertinent, official discussions of the Tier III and related inadmissibility issues which are publically available. The statements available are limited (for the purposes of this discussion) in that they center primarily on the issue of effective bars to refugee and asylum seekers, or Criticism 2, via the material support bar and the waiver and exemption authority. Thus the discussion in Part D is limited in its ability to

⁵⁶ These are the Congresses for which transcripts are available and which have been in session since the latest relevant legislative developments, or the waiver/exemption authority established in 2007.

narrow the acceptability of proposals, but provides a useful set of counterpoints to the criticisms and the proposals' suggestions unexplored prior to that point.

Of course, a separate analysis of Congressional and agency/principals' dispositions toward certain proposals would be necessary to fully account for a proposal's potential to be adopted at any given time. However, this analysis will only consider the favorability of the proposals based on the official testimonies most closely considering the issue thus far. Future research might tackle the monumental task of gathering comprehensive statements by individual Congresspersons and principals (or those directly responsible for enacting changes to the legislation) to determine which proposals could be adopted under which administration and Congress.

Finally, Section VI will advance a recommendation for which of the eight proposals would be the most pertinent to pursue at this time given the proposals' potential impact and its adoptability. Such a recommendation will have to take account of both the potential impact of the proposal as well as adoptability, and could feasibly be a combination of proposals. The recommendation should consider the inherent tension between the desire on the part of Federal agencies to maintain discretionary authority and the desire on the part of advocates for change to alter the TRIG statutes in such a way that prevent unjust application of the provisions. Thus it is appropriate to conjecture that the proposals which "score the best" in Part A's impact analysis would not necessarily prove to be the most adoptable in Part B, given that these are the proposals which entail the greatest limitations to the statutory authority accorded by the legislation. If one exists, a proposal which alleviates some of the criticisms (preferably all) but allows significant (perhaps little changed) discretionary authority by relevant agencies would be more likely to be adopted, as such a proposal would garner support from members of Congress and civil society

interested in limiting the detrimental effects alleged of the legislation thus far, but would to allow the agencies utilizing the legislation to do so with continued discretionary authority by field experts.

V. Analysis of the Proposals

A. *The Primary Criticisms*

This section will explore the main criticisms of the Tier III inadmissibility, or those criticisms which are most widely noted in the academic and policy communities. These are: 1) the over-breadth of the Tier III definition of an undesignated terrorist organization, 2) the imposition of effective bars to refugees and asylum seekers, and 3) the bureaucratic backlog of immigration cases. While Criticism 1 is fundamental to Criticisms 2 and 3, Criticisms 2 and 3 are separated from 1 as they are often referenced as distinct issues in the literature, and are separately the basis for various recommendations made by the same literature. Criticisms 1 and 2 are “substantive” criticisms of the legislation—that is they take issue with the language and use of the provisions themselves. Criticism 3 is critical of the administrative results of the Tier III and terrorism-related inadmissibility provisions.

Criticism 1: Over-breadth of the Tier III Definition of a Terrorist Organization

The fundamental, over-arching complaint pertaining to the TRIG provisions is that the Tier III inadmissibility net is too broad—that it bars too many individuals and organizations who do not meet conventional standards of terrorism. The Tier III provision defines an undesignated terrorist organization as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, the [terrorist] activities described in subclauses (I) through (VI) of clause (iv).”⁵⁷ This definition, in comparison to the academic, international, and even agency definitions of terrorism explored previously, is much broader. For example, it does not contain elements of premeditation, motive/ideological objective, or desired effects. Where U.S. Federal agency definitions require that the terrorist act be undertaken to influence or

⁵⁷ Immigration and Nationality Act. 8 U.S.C. 1182 §212 (a)(3)(B)(vi)(III).

to damage, the Tier III provision has no such requirement. Where international definitions focus on the intentional nature of the activity and academic definitions require political violence and/or effects beyond the immediate victims, the Tier III definition is not similarly limiting.

Kidane (2010) explains that the counterterrorism immigration policy and procedure adopted by the U.S. after 9/11—specifically the Tier III provision—is unique within his cross-jurisdictional study in not requiring a link between the denial of entry and a threat to national security. He argues further that because the scope of terrorist activity under the Tier III inadmissibility is so broad, and because Tier III is not subject to the same kind of public scrutiny as a terrorist designation list (as is produced by Tiers I and II and by other jurisdictions in his study), it generates unacceptable results—denying persons from Nelson Mandela to legal officials assisting U.S. forces in Iraq.⁵⁸

Stock (2010) is particularly critical of the extreme nature of Tier III inadmissibility provision of the INA, by which she argues, “the United States could deny visas...to any foreigners ever involved in a knife fight in a bar.”⁵⁹ Stock argued the result of this overbroad policy was an illogical system of national security-minded immigration policy.⁶⁰ In considering this definitional over-stretch, Human Rights First (HRF) compiled a list of organizations which are classed as Tier III terrorist organizations, but which are not considered terrorist organizations by the U.S. government in any other context. These include:

- All Iraqis, and Iraqi groups, which rose up against Saddam Hussein in the 1990’s...;
- All Iraqis, and Iraqi groups, that later fought against Saddam Hussein’s armies in conjunction with the Coalition forces that ultimately overthrew his regime in 2003;

⁵⁸ Kidane, Won. (2010.) “The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom and the United States: Transporting Best Practices.” *Fordham International Law Journal*. Vol. 33.

⁵⁹ Stock, Lt. Col. Margaret D. 2010. “The Role of Immigration Policy in the Struggle Against Terror.” In *Legal Issues in the Struggle Against Terror*, eds. John Norton Moore and Robert F. Turner. Durham, NC: Carolina Academic Press: 444.

⁶⁰ *Ibid*, entire.

- All of the Afghan *mujahidin* groups that fought the Soviet invasion in the 1980's, with U.S. support;
- The Democratic Unionist Party and the Ummah Party, two of the largest democratic opposition parties in Sudan, many of whose members were forced to flee the country in the years after the 1989 military coup that brought current President Omar Al-Bashir to power;
- The Sudan People's Liberation Movement/Army (SPLM/SPLA), the South Sudanese armed opposition movement that after years of civil war in pursuit of southern self-determination is now the ruling party of an autonomous Government of South Sudan;
- Virtually all Ethiopian and Eritrean political parties and movements, past and present;
- Every group ever to have fought the ruling military junta in Burma that was not included in the legislation that removed the Chin National Front and others from the scope of the Tier III definition;
- Any group that has used armed force against the regime in Iran since the 1979 revolution;
- The Movement for Democratic Change (MDC), the main political opposition to President Robert Mugabe of Zimbabwe.⁶¹

Some maintain that the fervent reaction to 9/11 by Congress in the form of the USA PATRIOT Act resulted in hurried legislation inconsistent with the U.S.'s moral and constitutional duties, as well as to international norms and laws, inclusive of the Tier III definition of a terrorist organization. Still others would argue that such criticism, based on the climate in which the legislation was passed, is irrelevant to the equity and effectiveness of the legislation.

Criticism 2: Effective Bars to Refugees and Asylum Seekers

The effective bars to refugees and asylum seekers arising from the Tier III inadmissibility come mainly through the material support provision's connection to the Tier III inadmissibility. Without the Tier III definition of a terrorist organization, the material support bar would apply to a far smaller group of people—that is, only to people supplying material support to Foreign Terrorist Organizations or one of the organizations on the Terrorist Exclusion List. The argument

⁶¹ Human Rights First. (2009.) "Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States." November 2009: 4-5.

in regards to refugees and asylum seekers is that persons fleeing persecution are among the larger number of persons (sometimes disproportionately so) unfairly caught in the TRIG net by virtue of having provided material support to Tier III terrorist organizations—specifically support provided under duress, inadvertently, or at an insignificant level.

The criticism has been explored by such groups as Human Rights First (HRF) and the Georgetown University Law Center’s Human Rights Institute, who have focused on the material support bars’ effect on refugees and asylum seekers in the U.S. HRF’s report highlights several controversial ways in which the material support bar is currently being used to deny refugees and asylum seekers immigration privileges to the U.S., including the denial of persons for material support provided under duress or for small/insignificant amounts of material support.⁶² The 2006 report entitled “Unintended Consequences” from Georgetown University Law Center Human Rights Institute’s Refugee Fact-Finding Investigation details several cases in which the material support bar has been interpreted to bar refugees. In the case of *Arias v. Gonzalez*, a farmer who paid his employer’s “vacuna”⁶³ to the Revolutionary Armed Forces of Colombia (FARC) was deemed inadmissible on the grounds that the vacuna constituted material support to the FARC.

Furthermore, among the most controversial ways in which the material support bar is applied to refugees and asylum seekers is via the imposition of inadmissibility on the basis of the individual’s *inadvertent* provision of material support to members of Tier III (or other) terrorist organizations. Georgetown University Law Center’s report finds that in 24% of cases it studied in which Tier III inadmissibility from material support was enacted, the support to a terrorist

⁶² *Ibid.*, 6.

⁶³ “Vacuna”, literally translated to “vaccine”, is the equivalent of an involuntary tax paid to the gang/party/war lord/guerrilla in charge with the understanding that if it is not paid, harm to the delinquent is expected.

organization was unintentional.⁶⁴ Barrett Duke of the Southern Baptist Convention notes that the material support provision has barred doctors for their aid to wounded terrorists, at times without the knowledge that their patient was a terrorist at all.⁶⁵

Even more controversially, immigrants may be denied admissibility even after direct support of the U.S. government, and/or despite tacit U.S. acceptance of the material support. Husarska (2008) tells the story of Saman Kareem Ahmad, an Iraqi Kurd who worked with the U.S. marines and was subsequently denied asylum in the U.S. on the basis of his previous involvement with a group which fought against Saddam Hussein's government.⁶⁶

It has also been argued that the current use of waiver authority for the material support provision, which could feasibly relieve some/all deserving refugee and asylum cases of the material support bar, is inadequate both in the extent of its use thus far and the speed at which it can be enacted in a particular case. Especially in cases where refugees have lived in the U.S. for years and been granted refugee status, Senior Director at the Hebrew Immigrant Aid Society Melanie Nezer argues that the process for clearing cases of the Tier III inadmissibility needs to be faster.⁶⁷

While this project will only consider the material support bar in its analysis of effective bars to refugees and asylum seekers, there are additional TRIG barriers to refugees and asylum seekers. For instance, groups which may be found inadmissible under Tier III statute likely will

⁶⁴ Fleming, Mark, Emi MacLean and Amanda Taub, Eds. (2006.) "Unintended Consequences: Refugee Victims of the War on Terror." Georgetown University Law Center Human Rights Institute Refugee Fact-Finding Investigation. (May 2006): 22.

⁶⁵ CQ Staff. "Laws to Keep Out Terrorists Also Block Refugees, Groups Say." Congress.org. http://www.congress.org/news/2010/12/21/laws_to_keep_out_terrorists_also_block_refugees_groups_say (March 30, 2011).

⁶⁶ Husarska, Anna. (2008.) "Exile Off Main Street: Refugees and America's Ingratitude." *World Affairs*, Summer 2008: 89.

⁶⁷ CQ Staff. "Laws to Keep Out Terrorists Also Block Refugees, Groups Say." Congress.org. http://www.congress.org/news/2010/12/21/laws_to_keep_out_terrorists_also_block_refugees_groups_say (March 30, 2011).

not be considered for the U.S. State Department's determination of prioritization for refugee-group resettlement, including some who "pose no apparent national security risk and to whom the U.S. is sympathetic."⁶⁸

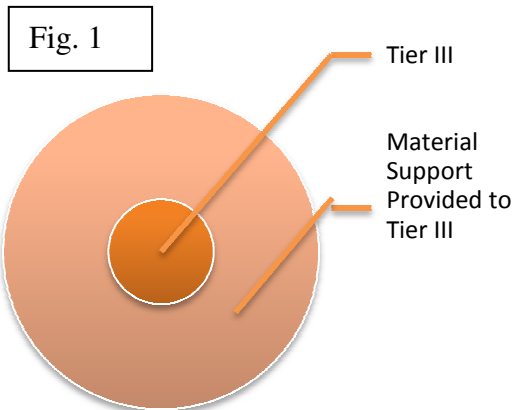
Several authors argue that there are already mechanisms in both U.S. immigration and refugee law, as well as international refugee law, which provide means to deny immigration privileges to refugees and asylum seekers who represent a security threat to the U.S. Thus the use of TRIG in refugee and asylum cases is redundant and unnecessary. HRF's report enumerates a number of situations under which refugees and asylum seekers posing a security risk to the U.S. may be denied immigration privileges, apart from the Tier III provision, including: individuals who are believed to be entering the U.S. to engage in unlawful activity, whose entry would have adverse foreign policy consequences, who have ties to totalitarian entities or past involvement in genocide, torture, or extrajudicial killings, or who have engaged in terrorist activity or are representative of a terrorist organization.⁶⁹ Feller (2006) similarly explains that the Refugee Convention of 1951 provides adequate tools for distinguishing between terrorists and legitimate refugees, and for denying terrorists refugee privileges.⁷⁰ Feller argues that as a result of the increasingly felt need to protect the refugee and asylum system from abuse and national security threats, refugees and asylum seekers are mischaracterized as criminals, terrorists and as illegitimate migrants attempting to "cheat the system." This mischaracterization, to which the Tier III and material support provisions have contributed, is fundamentally undermining the protection the refugee and asylum systems are meant to provide.⁷¹

⁶⁸ *Ibid*, 3.

⁶⁹ Human Rights First. (2009.) "Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States." November 2009: 6.

⁷⁰ The Refugee Convention, Feller argues, is necessarily supplemented by national laws which serve to bolster the established international protocol, not to develop its own *modus operandi*.

⁷¹ Feller, Erika. (2006.) "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come." *International Journal of Refugee Law* (December 1, 2006).



It is useful to illustrate Criticisms 1 and 2 together, as in Figure 1. If the space on the page represents all individuals applying for immigration privileges in the U.S., the innermost circle represents the portion of those individuals/groups barred for involvement in an

undesigned terrorist organization. The second, outermost ring represents the individuals barred by material support to those Tier III organizations. It is proportional in size to the inner circle, as the greater number of terrorist organizations considered to be Tier III the greater number of individuals providing material support to people/organizations considered Tier III and the greater number of those individuals inadmissible under the material support provision. If the inner circle expands with an increased number of Tier III inadmissibility findings, the outer circle expands accordingly.⁷² The proposals then, in attempting to combat Criticisms 1 and 2—implicitly to limit the number of people barred by the Tier III and material support provisions—should reduce the sizes of the inner or outer circles, or both.

Criticism 3: Administrative Backlog of Immigration Cases

The final major criticism of the current state of the Tier III and related inadmissibility provisions is the allegedly unnecessary, inequitable, and at times crippling backlog of cases in U.S. immigration proceedings. The backlog developed after the 2001 enactment of the USA PATRIOT Act and the 2005 enactment of the REAL ID Act primarily because of the large

⁷² Such an example can be slightly misleading, as a Tier III determination can arise when a consular or immigration official is reviewing a case of material support, and concludes that the organization to whom the support was provided qualifies as Tier III, even if it had not been considered such in any immigration cases to that point. However, both circles still expand proportionally and simultaneously.

number of Tier III and material support inadmissibility cases that resulted from the expansion of TRIG provisions. Critics argue that adequate administrative procedures—to deal with the increased number of cases and to perform the appropriate review by Federal agencies and judiciaries—were poorly developed. As a result, cases wait too long in immigration proceedings related to Tier III inadmissibility to determine either final inadmissibility and removal, or whether a waiver is available, applicable, and appropriate.

Several aspects of the legislation and the process for handling a Tier III determination may be considered to have contributed to the case backlog, including the general scope of the TRIG provisions and the requirement that a determination of waiver eligibility comes only at the decision of a principal.

HRF's report argues specifically that the piecemeal approach to dealing with the enactment of the Tier III and related provisions in immigration cases results in the unnecessary consumption of high-level government officials' time and in delayed adjudications resulting in prolonged detentions and separation of families.⁷³ The report specifically cites the waiver process for Tier III cases in contributing to the case backlog, and describes the flaws in the immigration court waiver process:

(1) it does not provide for waiver consideration until the applicant has already been ordered deported and that order is considered administratively "final," resulting in years of unnecessary delay and, in some cases, prolonged detention, as well as significant expense to the government; (2) it does not apply to the unknown number of cases denied based on the "terrorism bars" between October 2001 and September 2008, unless and until the applicant is detained; (3) it provides no protection against actual deportation for people for whom the Department of Homeland Security has not yet implemented waivers—individuals in this situation whose applications for asylum are being adjudicated by the Department of Homeland Security are placed "on hold" pending waiver implementation, but those whose applications for asylum are adjudicated by the immigration courts are not. These defects are having a serious impact on asylum applicants whose cases have been before the immigration courts.

⁷³ Human Rights First. (2009.) "Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States." November 2009: 2.

This project will not explore the complex processes for adjudicating TRIG cases, though many questions do exist as to the appropriateness of certain courts and detention processes. The analysis of the proposals' effects on this particular criticism of the TRIG statutes will consider only whether the institution of the proposal will affect 1) the number of cases in proceedings and 2) the speed of the process—which is considered to involve only the extent of review a case requires (e.g. to obtain a waiver) and not idiosyncratic issues which cause certain cases to take greater or less time than others.

B. Classification Scheme for Comparing the Proposals' Impact

The following classification scheme will address the impact of each of the proposals on the above three criticisms. Because it is the criticisms which led to the proposition of changes to the INA's TRIG statutes, it is the criticisms which are the most appropriate standards by which to judge the potential impact of the proposals.

The rating scheme developed here will assign a label to each proposal for each criticism—thus each proposal will have three classifications which are then comparable to one another. These classifications, proposed below, will not be based upon a subjective valuation of the criticisms or the merits of the proposal, but will as objectively as possible address whether or not the criticisms are assuaged by the proposed changes.

Criticism 1

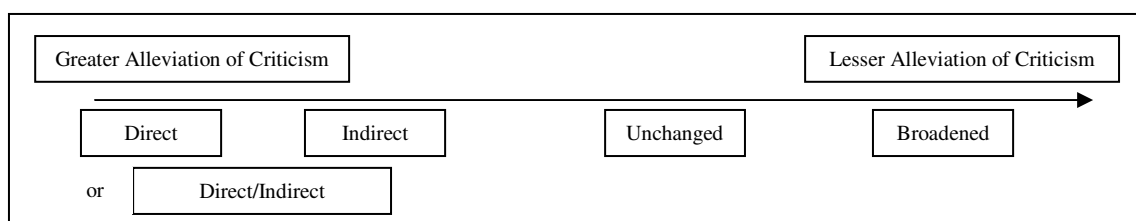
Given that the primary criticism of the legislation is that the Tier III definition of a terrorist organization is philosophically too broad, the proposals should principally aim to narrow the definition. The definition could be a narrowed *directly* (by a change to INA §212 (a)(3)(B)(vi)(III)) or *indirectly* (vis-à-vis a change to another provision such as the material support bar which limits the scope of the Tier III statute). It is important to acknowledge that it is possible to reduce the number of Tier III determinations in several ways, but this project's classification of a proposal's impact with regard to Criticism 1 is concerned only with the proposal's systematic impact on the definition of a Tier III organization, and not simply on a reduction in number of Tier III cases. This research regards "systematic impact" as a change which limits the definition or extent of the Tier III provision in any case regardless of affiliation with certain terrorist organizations or other distinctive attributes which apply only to certain groups, such as the date of the activity of material support provided to a specific organization. In

this view, only changes which alter the “philosophy” of the Tier III definition and related provisions—the definitional breadth—qualify as direct or indirect changes to the provision.

It is intuitive to assume that a direct modification would have a greater overall impact because it reduces the breadth of the definition of a terrorist organization and thus also limits the numbers of people potentially barred by material support to that organization. However, it is not necessary that a *direct* impact on Criticism 1 have a greater impact in terms of the absolute number of cases relieved of the TRIG bars.

It is further possible that a proposal will have *no impact* on the scope of the Tier III definition, or that a proposal could *broaden* the definition of an undesignated terrorist organization, though given that the proposals are generally made in light of alleged criticisms, the later situation should be rare if nonexistent. Therefore, for every proposal we will assign a one-word label for its affect on the Tier III provision: *direct*, *indirect*, *unchanged*, or *broadened*. Along a continuum of how much change this would entail, we could configure a scheme such as the one in Figure 2.

Fig. 2



Criticism 2

Any proposed modification to the legislation will also necessarily have to consider its affect on refugees and asylum seekers. Because Criticism 2 is that refugees and asylum seekers are inadvertently and unfairly barred by the Tier III legislation (or that the use of Tier III in barring refugees is redundant to other provisions of U.S. and international refugee law), the

proposals should be aimed at limiting the number of refugees and asylum seekers barred inadvertently/unfairly by the TRIG provisions. Therefore, this analysis will consider ways in which proposals limit the scope of the material support bar (the clause most intimately affecting the refugee and asylum seeking populations) to determine the impact on Criticism 2. We can also predict, using Figure 1, that limiting changes to the Tier III provision will limit the number of refugees barred by the material support provision, because material support provided to fewer organizations would be inadmissible.

A proposal which limits the material support provision will be classified as a *direct* limitation of the effective bars to refugee and asylum seekers, and a proposal limiting the definition of a terrorist organization will be classified as an *indirect* limitation. It is possible that no change will be made by a proposal to the effective bars to refugee or asylum via the Tier III or material support provisions or that a proposal would broaden the effective bars to refugees and asylum seekers. Thus for this category each proposal will be classified as: *direct*, *indirect*, *unchanged*, or *broadened*. The continuum depicted in Figure 2, above, is applicable as a frame of reference here as well.

Criticism 3

This project will finally consider the effects on the administrative backlog of a proposal, as compared to the administrative backlog resulting from the 2001 and 2005 adjustments to the INA's TRIG provisions. Because this project does not consider the process of adjudication of claims and other issues which are related to this administrative backlog, but merely notes the channels through which the backlog is produced, the analysis of the proposals' impact will be correspondingly surface-level. This is because it is impossible to predict, especially without an exact plan for implementation, what bureaucratic and paperwork channels will be utilized. It

would not be unreasonable to say that the enactment of any legislation would temporarily, in the long- or short-run, increase case build-up as the implementation processes are established.

(Indeed this is one argument that could be made to defend the case build-up as a result of the Tier III and related legislation.) Similarly, one does not know how any proposal would affect the *existing* case backlog. Because even if one knows whether the proposal changes an aspect of the legislation which currently effects the buildup of cases, one does not know what methods the courts and federal agencies will use to addresses cases theoretically affected by the proposal that are already in immigration proceedings. However, one may hypothesize whether the proposals will lessen the number of cases in immigration proceedings in the future based on what has contributed to the current backlog of cases. This analysis will disregard short-run effects of newly enacted legislation on bureaucratic process, and will consider only 1) whether the number of cases in immigration proceedings would be less if the proposal were currently in effect and 2) whether the proposal will entail changes in court/administrative review (e.g. for a waiver or principals' judgment). Thus for each proposal this analysis will conclude that the case backlog has been *reduced*, *unchanged*, or *exacerbated*, based on the proposal's effect on the number of cases to be barred by Tier III and related provisions and on the requirements for review of the cases for which the provisions apply.

In some ways this measure is redundant to the evaluation of the above criticisms because of the measure of "number of cases" in immigration proceedings. Ultimately, because the primary criticism is that the Tier III net is too broad, each of the criticisms is focused in some way on how "too many" cases of Tier III exist. However, it is an important consideration in and of itself, as the other classifications of proposals are more so an evaluation of the substance of the proposal and only indirectly consider the number of Tier III inadmissibility cases. The

explicit classification of the effects of a proposal on the administrative backlog is a more discrete measure of the effect of a proposal on the institutional immigration infrastructure.

The Classification Scheme

In summary, table V.B.1 is a template for the potential classifications of each proposal.

Table V.B.1	Criticism 1: Over-breadth of the Tier III Definition of a Terrorist Organization	Criticism 2: Effective Bars to Refugee and Asylum Seekers	Criticism 3: Administrative Backlog of Immigration Cases
"Proposal"	direct/ indirect/ unchanged/ broadened	direct/ indirect/ unchanged/ broadened	reduced/ unchanged/ exacerbated

Certainly one could level the criticism that such an analysis is not adequately detailed or nuanced to evaluate such diverse policy proposals, and one would be partially correct. The goal of this classification system is not to wholeheartedly advance one policy suggestion over another on the basis of this simple classification. It is designed to create a starting point for analyzing policies against one another in a way that has heretofore been neglected by those advancing such proposals, and which will be helpful in considering whether changes could or should be made to the legislation. In this view, it could be suggested that if the proposals evaluated are consistently classed as *direct/indirect*, *direct/indirect*, and *reduced*, respective to criticisms one, two, and three, policy changes might be desirable because many diverse policies represent an amelioration of criticisms of the legislation, at least in terms of the criticisms evaluated here. Contrastingly, consistent scores of *broadened/unchanged*, *broadened/unchanged* or *exacerbated* could indicate that changes to the legislation are undesirable or unnecessary, or at least that further proposals need to be made.

C. Analysis: The Proposals and their Impact

This section will analyze the potential impact (of the “adoption→implementation→impact” framework) of each of the proposals with regard to the three primary criticisms explored above, utilizing the classification scheme developed in Part B recommended. For each proposal the content, reason for recommendation, and method of implementation is explored. This is followed by a discussion of whether and how the proposal addresses each of the three criticisms in Part A. Each proposal is then assigned three labels according to the classification of the proposal’s theoretical impact on each of the criticisms.

It is worth noting that the evaluation of the proposals’ theoretical impact is contingent on the proposals being aimed at true problems. If the problem which the proposal purports to address does not exist, then the impact will be similarly fictional, because the initial conditions which the impact would “remedy” do not exist. Because of privacy limitations in accessing individual cases of Tier III and related inadmissibility, the information which would allow this project to determine whether and how often each of the issues delineated by the proposals emerge in actual cases is unattainable. Thus this project relies on secondary sources and reports, which are often produced by lawyers, case workers and other officials with direct access to persons undergoing these cases.

The eight proposals considered here are so because they are the most commonly recommended in the literature (e.g. HRF’s Denial and Delay, Georgetown “Unintended Consequences,” etc.) but also because they represent a varied degree of effects on the legislation. In the following analysis, some proposals recommended less often but with effects identical to proposals explored are also mentioned.

1. *No modification to the application of Tier III, nor to the current process of adjudicating cases and waiver issuance.*

In an analysis of policy options, one must always consider the option to do nothing.

Perhaps more than in a scientific experiment, the “do-nothing” or “control” option is important in considering policy alternatives. Policy inertia and bureaucratic hurdles can influence or even incentivize the option to continue with the current policy. In the case of Tier III and related TRIG provisions, there are many proponents of the legislation as it currently stands. These proponents may or may not acknowledge the validity of the criticisms outlined in Part A, but still favor the policy as it currently exists in the INA and immigration processes.

In a 2007 hearing before the U.S. Senate Committee on the Judiciary Subcommittee on Human Rights and the Law, Deputy Assistant Secretary for Policy at DHS Paul Rosenzweig, argues that, “the INA’s broad definitions of terrorist activity and the provision of material support to terrorists or terrorist organizations are at the heart of the U.S. government’s ability to be proactive in its counter-terrorism efforts.”⁷⁴ Rosenzweig provides specific examples of instances in which the material support bar was successfully wielded by immigration and law enforcement officials to bar/deport individuals providing material support to terrorist organizations. In one case, an alien from Saudi Arabia who entered the U.S. as a student was removed for his assistance running an Al Qaeda front group’s website and for soliciting funding for the organization; in another an alien applying to become a legal permanent resident of the U.S. was placed in removal proceedings for his involvement in a group which included Al Qaeda

⁷⁴ Rosenzweig, Paul. (Deputy Assistant Secretary for Policy U.S. Department of Homeland Security.) “Statement before the United States Senate Committee on the Judiciary Subcommittee on Human Rights and the Law on the “Material Support” Bar: Denying Refuge to the Persecuted.” September 19, 2007.

associates.⁷⁵ Rosenzweig also expresses his belief in the sufficiency of the existing waivers of material support to the groups issued exemptions by DOS and DHS. He argues that this condition makes the current state of the legislation acceptable both in terms of providing immigration benefits to deserving foreign nationals and in maintaining the greatest protection of national security via continued, ample discretionary authority.⁷⁶

Three years later, in 2010, DHS' Former Special Advisor for Refugee and Asylum Affairs Igor V. Timofeyev argued against the Refugee Protection Act of 2010, which proposed changes to the INA's inadmissibility provisions, including removal of the Tier III statute.

Timofeyev argued against the modifications, saying,

We must remain a welcoming home to refugees and asylum seekers from around the world. But we must also be cognizant of the important role that the immigration law plays in our counter-terrorism and immigration enforcement efforts. In recognition of the unfortunate realities of today's dangerous world, it is essential that immigration law provides agencies in the executive branch with the flexibility necessary to deny admission to the United States, or to deny protection once inside the country, to dangerous individuals, such as individuals who support terrorist organizations.⁷⁷

He, like Rosenzweig speaking three years earlier, also acknowledges the sufficiency of the waiver process, arguing,

There are, of course, groups that have been encompassed within the Tier III designation whose activities do not pose [sic] a threat to the United States. Indeed, some of these groups have engaged in these activities in order to defend themselves against oppressive foreign regimes, and in some instances have done so with the encouragement of the United States. The existing waiver authority allows the Executive to exempt both members and supporters of these organizations from the terrorism inadmissibility bars,

⁷⁵ In both examples, the terrorist cells to which support was provided were connected to Al Qaeda, not Tier III terrorist groups. The second case is one in which the alien was removed based on the group's classification of Tier III by virtue of subgroup's terrorist activities, a controversial aspect of Tier III application.

⁷⁶ Rosenzweig, Paul. (Deputy Assistant Secretary for Policy U.S. Department of Homeland Security.) "Statement before the United States Senate Committee on the Judiciary Subcommittee on Human Rights and the Law on the "Material Support" Bar: Denying Refuge to the Persecuted." September 19, 2007.

⁷⁷ Timofeyev, Igor V. (Associate at Paul, Hastings, Janofsky & Walker, LLP.) "Statement before the United States Senate Committee on the Judiciary Hearing on Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010." May 19, 2010.

and the Executive has exercised this authority with respect to at least a dozen organizations since 2006 to the present.⁷⁸

The Refugee Protection Act of 2010 never became law.

Impact

Inherently, the *no modification* proposal would have no impact on the definition of terrorism and terrorist organizations as it exists under Tier III. It would also have no impact on the complaints lodged concerning the status of refugees and asylum seekers under the Tier III and related provisions, nor on the case backlog which exists—negative or positive. The *no modification* proposal thus appears as a control-type case. Though, to consider this proposal purely as a control is misleading because it is a viable policy option. The final classification of the no modification proposal is depicted in Table V.C.1.

Table V.C.1	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 1: No Modification	Unchanged	Unchanged	Unchanged

2. *Modification of the exemption/waiver processes via expanded categories or authority for issuing of exemptions/waivers.*

As previously noted, several relevant exemption authorities already exist. These include the authority to waive the TRIG statutes’ invocation or to exempt individuals from many of the TRIG provisions (individual), the authority to exempt entire groups from the Tier III provision (categorical), and the authority to exempt individuals providing material support to organizations and individuals engaged in terrorist activity (individual or categorical).⁷⁹ The recommendations

⁷⁸ Timofeyev, Igor V. (Associate at Paul, Hastings, Janofsky & Walker, LLP.) “Statement before the United States Senate Committee on the Judiciary Hearing on Renewing America’s Commitment to the Refugee Convention: The Refugee Protection Act of 2010.” May 19, 2010.

⁷⁹ 9 FAM 40.32 N5; United Nations High Commissioner for Refugees. 2006. “Material Support” and Related Bars to Refugee Protection: Summary of Key Provisions of the Immigration and Nationality Act (INA). <http://www.rcusa.org/uploads/pdfs/ms-summ-unhcrkeyprov12-06.pdf> (March 30, 2011) : 4.

to modify the exemption/waiver authority are many and nuanced, but ultimately can be considered one or a combination of three types of proposed change: 1) expanding the categories of persons/groups eligible to receive exemptions/waivers for which the issuing authority already exists, 2) expanding the waiver authority to offer different types of waivers (i.e. for different aspects of the INA §212(a)(3)(B) provisions than are currently offered), or 3) modifying the process through which a waiver can be received in order to decrease the time a given case spends in immigration proceedings.

One need only refer back to the extensive list of examples of organizations which qualify for Tier III inadmissibility but which are not considered terrorist organizations in other U.S. government contexts, compiled by HRF (above), to see that there are numerous candidates for continued categorical (and individual) exemptions/waivers to the TRIG provisions. HRF implies that further issuance of categorical waivers would be beneficial, and explains that while a solution addressing the breadth of the Tier III definition would be ideal, the issuance of individual waivers continues to be necessary despite the plagued system for doing such.⁸⁰

The recommendations for expanded waiver authority to different types of waivers are also diverse. They include: expanded waiver authority for material support provided under duress,⁸¹ waivers for spouses and children of terrorists, waivers of Tier III findings in cases where individuals have already undergone immigration screening processes (e.g. those who are filing for change of status) and received immigration or relief status as a result of the prior

⁸⁰ Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 5.

⁸¹ The expanded waiver authority for cases of material support provided under duress mirrors the directive issued by Secretary of Homeland Security Chertoff in February of 2007, and so is conceivably already practiced in the relevant cases.

application.⁸² The latter recommendations are especially geared towards the “key flaws in the immigration court waiver process” as delineated by HRF.⁸³

Similarly, HRF argues that the INA§240 waiver authority should be able to be utilized immediately after grounds for relief are found if the only relevant inadmissibility is the terrorism bar, and furthermore, that removal proceedings should not be completed until exercise of the waiver is considered. In a related recommendation, HRF suggests that waiver decisions should be permitted at the same time as the decision in the immigration case by granting the Attorney General waiver authority in cases before DOJ, which he may delegate to immigration courts.⁸⁴ HRF also recommends that all cases eligible for waiver privileges should be forwarded from immigration proceedings to U.S. Citizenship and Immigration Services (USCIS) for review to ensure proper consideration prior to deportation.⁸⁵

Notably, the recommendations for expanded waiver/exemption authority are very similar to the recommendations in Proposals 3-6. The difference is that the proposals recommend systematic change to the provisions, whereas the institution of waiver authority means that the invocation of the provision can be presumed inapplicable by an exercise of discretion on the part of agency and adjudicating officials. Thus inherent in the waiver or exemption authority is the continued exercise of discretion.

These recommendations do not imply a specific method of implementation. However one can assume that the implementation of additional waiver/exemption authority would occur in the same way as it has in the past—through procedural decrees or additional modifying legislation.

⁸² Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 13.

⁸³ *Ibid*, 10.

⁸⁴ *Ibid*, 12.

⁸⁵ *Ibid*, 13.

In this case, the method of implementation will not have a significant effect on the impact of the proposal.

Impact

The proposed modifications to the waiver process do not directly or indirectly modify the definition of an undesignated terrorist organization as it appears in the INA. Expanded waiver/exemption authority does not constitute a change to the language of the TRIG provisions, but merely represents the option to determine the provision inapplicable in certain instances. Therefore the changes are not systematic, but are almost by definition idiosyncratic in their application. *Unchanged* is therefore the classification for Criticism 1.

Changes to the waiver authority and process also would not modify the legislation's definition of material support directly or indirectly, and thus neither do they indirectly limit the scope of the Tier III provision. This means that there is also no direct effect on the effective bars to refugee and asylum seekers, or Criticism 2. Because the modifications to the waiver/exemption authority or processes do not affect the language of the definition of a Tier III terrorist organization, there is also no indirect effect on the effective bars to refugee and asylum seekers.

However, it is important to note two exceptions. First, the institution of more categorical exemptions/waivers to relieve groups of the Tier III terrorist organization label would shrink the inner circle in Figure 1, and would proportionally shrink the material support outer circle. This would constitute an *indirect* effect on the effective bars to refugee and asylum seekers IF those providing material support to the exempted organizations were refugees. Because of the specific nature of categorical exemptions/waivers, the reduction in the inner circle is likely to be very slight—dependent upon the number of groups waived/exempted. Second, the additional

influence of categorical exemptions/waivers for material support provided to certain organizations would shrink the outer, material support circle of Figure 1 and would also constitute an *indirect* effect on Criticism 2.

When considering the impact of this proposal on case backlog, it is important to make a distinction between the effects of exemptions and waivers. In terms of case backlog, the implementation of exemptions theoretically should not induce a greater backlog (except perhaps temporarily while the authority is implemented). This is because exemptions are determined by an interagency process and implicitly relieve cases of the Tier III distinction entirely, thus nullifying the need for case review.

However, with the implementation of a waiver authority we do not know how the administrative review of cases will be affected. Waivers require decisions on a case-by-case basis, and these are currently made at the decision of a principal, whose authority is not widely delegated. (Although one of the proposals is to delegate §240 waiver authority more widely and/or allow the waiver decision to be made at more stages of the immigration proceedings.) Increased availability of waivers could increase the number of cases under review and/or the time in reviewing cases which would have to undergo extensive immigration proceedings anyway, thus requiring more time and effort on the part of case defenders and adjudicators. However, one could make the argument that the increased availability of waivers of certain types—such as the duress and *de minimis* material support waivers—would enable more efficient defense of immigration cases, especially refugee and asylum cases, thus reducing the overall backlog as a set of cases is tried more easily and more quickly. Consequently, waivers could exacerbate *or* reduce the case backlog.

Thus in classifying the effect of Proposal 2 on Criticism 3, one can conclude the differential effects of exemptions, which would have a reducing effect on the accumulation of cases, and waivers, which could have a reducing or exacerbating effect dependent upon type, extent of use, and resultant bureaucratic processes.

Table V.C.2	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 2: Waiver/ Exemption Categories & Issuance	Unchanged	Unchanged/ Indirect	Reduced (exemptions); Exacerbated/ Reduced (waivers)

3. *Creation of a de minimis level of material support or of a more restricted definition of material support to terrorist organizations.*

One of the most common suggestions for modification of the TRIG statutes is the introduction of a *de minimis* level of support—or the introduction of a minimum level of support which permits admissibility and over which an applicant is considered inadmissible.

There has already been discussion in immigration courts as to whether or not the legislation was intended to preclude a *de minimis* level of support. Indeed it is an argument already put forth in defense of immigration applicants, including refugees and asylum seekers, against the material support bar.⁸⁶ In the only published decision considering the terrorism-related inadmissibility, the Board of Immigration Appeals argued that ““We are unaware of any legislative history which indicates a limitation on the definition of the term ‘material support’”” and “the statute is “clearly drafted” to prevent ostensibly benign contributions...”⁸⁷

⁸⁶ Jackman, Bard and Thomas K. Ragland. (2010.) “Litigating the Terrorism Bars: Perspectives from Canada and the United States.” *The Law and Society Association*: 3.

⁸⁷ *Ibid.*

Georgetown University Law Center's 2006 report, "Unintended Consequences," provides a concise summation of the controversy over the intent of the drafters of the statute, inclusive of its own opinion, saying:

Without an exception or waiver for *de minimis* situations, refugees like these will be unable to find safety in the United States. That interpretation of the law is problematic because it reads the word "material" out of the term "material support." Had Congress intended to bar *de minimis* contributions, they could have written the law simply to prohibit "support." The choice to include the word "material" indicates it that was not Congress's intention to punish contributions so tiny that they could have no material effect on terrorist capabilities.

The Department of Homeland Security, however, has argued the opposite. It argued before the Bureau of Immigration Appeals (BIA) and the United States Third Circuit Court of Appeals that Congress did not intend for the material support provision to include a *de minimis* exception, but rather that "material support" is a legal term of art that means *any* support, no matter how insignificant. The DHS interpretation effectively reads the word "material" out of the provision and concludes that even a contribution of a glass of water is "material" to the support of terrorists.⁸⁸

Georgetown University's Fact-Finding Investigation consequently recommends that Congress and DHS recognize a *de minimis* level of support.⁸⁹

HRF proposes that the *de minimis* level of support be implemented through an interpretive adjustment on the part of appropriate agencies and authorities, and not by statutory reform. This means that rather than changing the language of the actual statute to preclude *de minimis* levels of support, the officials involved should simply begin to interpret the provision to do so.

In the case of either statutory or interpretive reform, the institution of a *de minimis* level of support implies a case-by-case determination by consular, Immigration and Customs Enforcement (ICE) or court officials as to whether the support provided was at or below the *de minimis* level. Currently, the Board of Immigration Appeals does not have a precedent for

⁸⁸ Fleming, Mark, Emi McLean and Amanda Taub, eds. (2006) "Unintended Consequences: Refugee Victims of the War on Terror." Georgetown University Law Center Human Rights Institute Refugee Fact-Finding Mission. May 2006: 27.

⁸⁹ *Ibid*, 8.

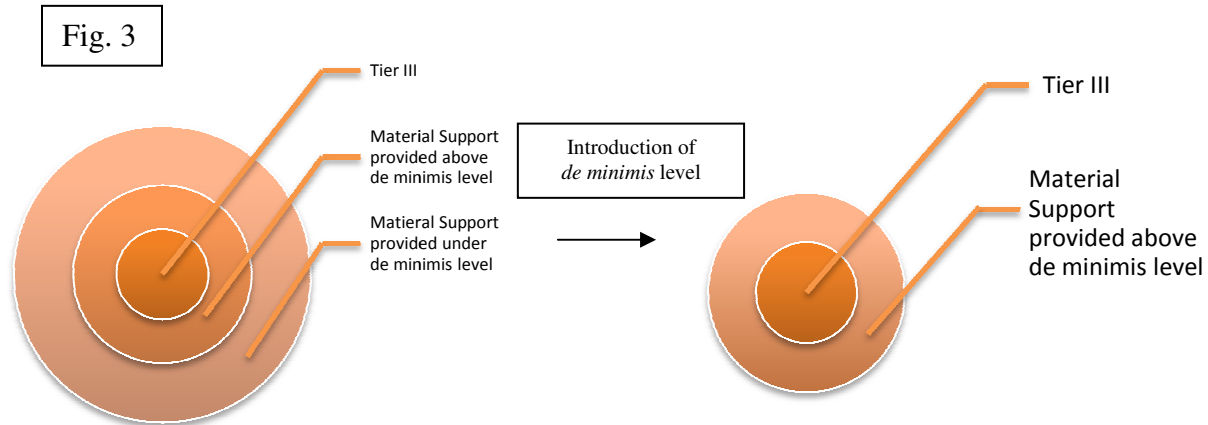
establishing a *de minimis* level of material support, though the argument that support did not meet a *de minimis* level has “fared well” in immigration courts.⁹⁰ Thus while it is possible to conceive of a set of subclauses detailing the *de minimis* level and type of material support, determining such would be a massive bureaucratic and research-intensive undertaking, and would likely not have the legal nuance that the variety of cases of material support provided to undesignated terrorist organizations would require. Because the *de minimis* defense has performed well in courts so far without a pre-existing precedent or definite level of material support, the value added to attempting the creation of one is limited. It is more likely that, as HRF recommends, the introduction of a *de minimis* level will consist of a change in adjudicatory attitude than in legislative design.

Impact

The implementation of a *de minimis* level of material support would not alter the definition of an undesignated terrorist organization. But it would reduce the number of invocations of the Tier III provision by shrinking the amount of material support considered inadmissible, because any support below the *de minimis* level would not trigger the inadmissibility. This amounts to a reduction in the size of the outer circle of Figure 1, and is classified as an indirect impact on Criticism 1. The implementation of a *de minimis* level of support would be a systematic alteration of the scope of the Tier III provision—that is regardless of the group to which one provides support, support below the *de minimis* level is permissible. Figure 3 depicts this effect. In Figure 3 the material support circle from Figure 1 is divided into material support provided under the *de minimis* level of support and material support provided over the *de minimis* level. With the institution of the recommended interpretive change

⁹⁰ Jackman, Bard and Thomas K. Ragland. (2010.) “Litigating the Terrorism Bars: Perspectives from Canada and the United States.” *The Law and Society Association*.

precluding *de minimis* levels of support from inadmissibility, the outermost ring would disappear, resulting a smaller number of inadmissibility cases.



Because the *de minimis* proposal directly limits the material support provision, the proposal is classified as a *direct* amelioration of the effective bars to refugee and asylum. However, it is important to recognize that it would not prevent the barring of applications for refugee or asylum by material support provided to Tier III organizations if the support is above the *de minimis* level.

The *de minimis* proposal is not likely to affect the administrative backlog of cases significantly because the recommended change does not specify an absolute level of *de minimis* support. This means that the final determination will likely necessarily come by approval of a principal or in an immigration court who determines that it meets the *de minimis* level, which is explored on a case-by-case basis. Thus cases—some of which are already being successfully defended on the basis of *de minimis* levels of support—would undergo the same extent of immigration proceedings, but ultimately have a greater chance of ending in a determination of admissibility than of inadmissibility. Thus the case backlog would be *unchanged*.

Table V.C.3	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 3: De Minimis Support	Indirect	Direct	Unchanged

4. *Creation of an exception for material support provided under duress.*

One of the major grievances resulting from the lack of a duress exception is that it means individuals who are victims of terrorist activity are being accused of complicity or assistance in those activities and organizations. Material support provided under duress means that the individuals were somehow coerced or forced into the provision of aid to the organization. There is a degree of irony in declaring inadmissible on terrorism-related grounds the action of an individual who was himself “terrorized” into performing that action.

Georgetown University Law Center’s 2006 report finds that in 73% of material support cases studied, the support was provided under duress, in contrast to 3% voluntarily provided and 24% provided inadvertently (discussed below).⁹¹ As a result, the report recommends both that Congress “establish an involuntary support exception for those who provided “support” under explicit or implicit duress.”⁹² HRF’s report similarly recommends to Congress that it amend the legislation to remove acts of material support performed under coercion from TRIG arguing that, in addition to the injustice which it represents, up until 2005 duress was recognized as a valid defense for the undesired/unintentional provision of material support in the courts.⁹³ The

⁹¹ Fleming, Mark, Emi McLean and Amanda Taub, eds. (2006) “Unintended Consequences: Refugee Victims of the War on Terror.” Georgetown University Law Center Human Rights Institute Refugee Fact-Finding Mission. May 2006: 22.

⁹² *Ibid*, iii.

⁹³ Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 12, 23

Refugee Protection Act of 2010 also recommended altering the language of the INA to except coerced acts of material support.⁹⁴

The *exception for material support provided under duress* is the first of the proposals considered in this analysis which would amount to an actual modification of the statutory inadmissibility language in the INA. The exception for material support provided under duress would likely be implemented by direct insertion into the language of the INA through a legislative amendment into the material support provision, or §212(a)(3)(B)(iv)(VI). Section 4(3) of the Refugee Protection Act of 2010 proposed the insertion of the phrase “other than as a result of coercion” after “to commit an act” in the material support provision of the INA,⁹⁵ thereby excepting individuals who were coerced into the provision of material support. The Act defined coercion to mean “(I) serious harm, including restraint against any person; or (II) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to, or restraint against, any person.”⁹⁶

The argument for the implementation of an exception of material support provided under duress is not limited to material support provided to undesignated terrorist organizations, though such is the concern of this analysis. The recommendation extends to material support provided to Tier I and II terrorist organizations—which is why a statutory amendment to the material support language, which would also apply to Tier I and II terrorist organizations, is appropriate and possible. Husarska (2008) argues that individuals providing material support to these organizations face no less difficult choices or injustice than individuals providing support under

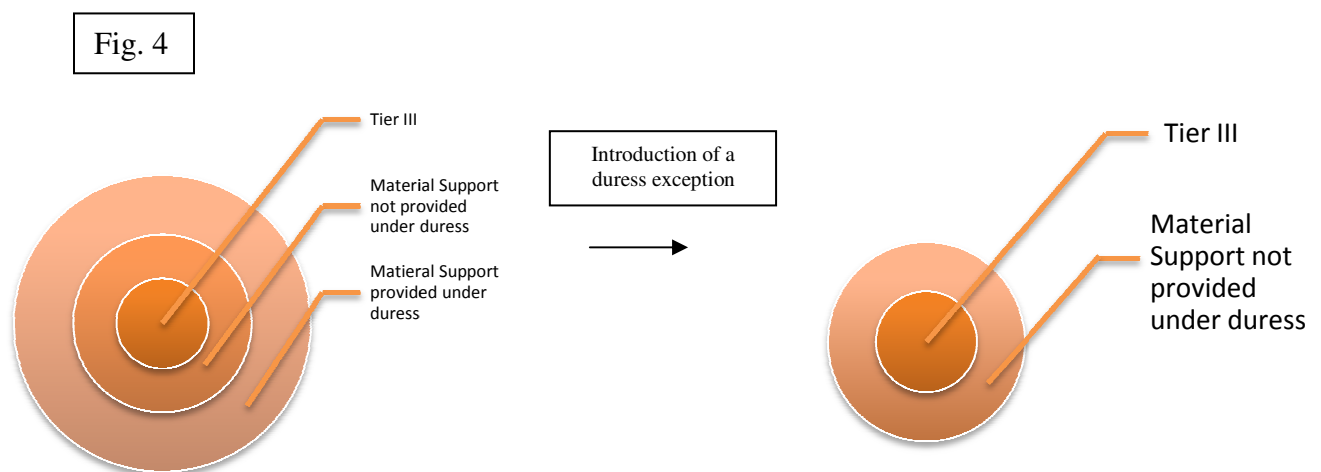
⁹⁴ The Refugee Protection Act of 2010 §4(3).

⁹⁵ *Ibid.*

⁹⁶ The Refugee Protection Act of 2010 §4(5).

duress to Tier III organizations.⁹⁷ However, when DHS Secretary Chertoff exercised his exemption authority for material support provided under duress in February of 2007, he did so only for support provided to Tier III terrorist organizations (only later extending it to a few Tier I terrorist organizations).⁹⁸

For the purposes of conceptualizing this change, the outer circle in Figure 1 may again be best represented by its division into two parts: “material support provided under duress” and “material support not provided under duress” (voluntarily or inadvertently). If a duress exception is included in the INA, the outermost circle drops out and the number of individuals barred is reduced.



Impact

The proposed addition of a duress exception does not narrow the Tier III definition of a terrorist organization directly, but does shrink the Tier III inadmissibility systematically via its limitation of the material support provision. This thus *indirectly* limits the definition of a Tier III terrorist organization by exempting an entire class of people—regardless of the time, location or

⁹⁷ Husarska, Anna. (2008.) “Exile Off Main Street: Refugees and America’s Ingratitude.” *World Affairs*, Summer 2008: 89-97.

⁹⁸ Alberty, Linda. (2008). “Affording Material Support to a Terrorist Organization—A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place.” *Immigration Law Advisor* 2(April) 4: 3.

specific organization to which support was provided—from inadmissibility for material support to an undesignated terrorist organization.

The inclusion of a duress exception would also limit the number of valid refugee and asylum cases barred under the Tier III-related inadmissibility, and is in fact likely geared toward remedying this particular criticism of the legislation. If Georgetown University Law Center’s statistics are representative of the overall population of refugee applicants providing material support to Tier III terrorist organizations, we could expect the inclusion of a duress exception in the language of the INA to reduce the number of refugee cases barred under material support provided to Tier III terrorist organizations by nearly three-quarters. Because the proposal modifies the language of the INA’s material support provision directly, it constitutes a *direct* effect on the effective bars to refugees and asylum seekers.

A duress exception would also have an effect on the current case backlog, as those cases which were under consideration for waivers of material support provided under duress or awaiting court review would be there unnecessarily. Again, it is unclear what type of administrative process would clear the immigration system of cases currently undergoing review and meeting the duress exception criteria. But with regard to future cases, fewer (up to 73% if Georgetown Law Center’s statistics are representative) refugee and asylum cases would be held in immigration proceedings for material support provided to terrorist organizations. This would be due to the implementation of the duress exception directly into the language of the INA, which would limit delays in the immigration review process as determinations that the exception applied could be made by immigration officials in the field and would not necessarily require review by a court or principal.

Table V.C.4	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 4: Duress Exception	Indirect	Direct	Reduced

The case of inadvertence and other conditions of material support.

Apart from the controversial nature of material support provided under duress or below a significant level, there also exist issues of inadvertent material support and material support provided on the basis of personal relationships to members of undesignated terrorist groups.

For instance, both Georgetown University’s Fact-Finding Investigation and HRF recommend that an exception be developed for support provided prior to an age at which legitimate consent can be given.⁹⁹ This would prevent the young daughters and sons of terrorists or young children coerced into support for terrorist organizations from being barred on the basis of material support. HRF similarly recommends that the TRIG provisions not apply to a person simply by virtue of an individual’s being the spouse or child of a terrorist.¹⁰⁰

Inadvertent provision of material support is the exact opposite of material support provided under duress. Where in a duress situation the individual providing support presumably knows to whom the support is going but gives it despite this in the face of some threat, inadvertent support is provided to persons of whose identity the provider is unaware.

⁹⁹ Fleming, Mark, Emi McLean and Amanda Taub, eds. (2006) “Unintended Consequences: Refugee Victims of the War on Terror.” Georgetown University Law Center Human Rights Institute Refugee Fact-Finding Mission. May 2006: iii; Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 12.

¹⁰⁰ Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 12.

Though unresolved, the question of whether *mens rea*, or “guilty conscience,” is relevant in material support cases has been considered by the Board of Immigration Appeals.¹⁰¹ Clearly in a case of inadvertence, the provider of material support should *not* have a guilty conscience. According to Georgetown University Law Center’s study, in cases of material support provided by refugees to armed groups, 24% were instances of inadvertent provision.¹⁰² This clearly raises the question of whether inadvertence should also be considered in the legislation governing terrorism-related inadmissibility.

The inclusion of these recommendations, made less frequently and with less specificity than those considered in this analysis, would modify the extent of the Tier III and related inadmissibility in nearly exactly the same way as the duress exception: limiting indirectly the scope of Tier III inadmissibility, directly reducing the number of refugees and asylum seekers barred, and potentially reducing the current case backlog.

5. *Introduction of the elements of “intent” and/or representation of a threat to national security into the Tier III provision.*

A major component of Criticism 1 of the breadth of the INA’s definition of an undesignated terrorist organization is the lack of a requirement for the individual/group to pose an explicit national security threat to the United States or, further, to show credible intent to harm the United States once granted immigration privileges. Both are key components of the designation of a Foreign Terrorist Organization (Tier I) by the Secretary of State under §219 of

¹⁰¹ Alberty, Linda. (2008). “Affording Material Support to a Terrorist Organization—A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place.” *Immigration Law Advisor* 2(April) 4: 2.

¹⁰² Fleming, Mark, Emi McLean and Amanda Taub, eds. (2006) “Unintended Consequences: Refugee Victims of the War on Terror.” Georgetown University Law Center Human Rights Institute Refugee Fact-Finding Mission. May 2006: 29.

the INA, and one or both are included in most academic and Federal agency definitions of terrorism.¹⁰³

A State Department report, as quoted by Nezer et al., laments that the Tier III provision bars “some individuals and groups who are engaged in opposition to repressive regimes, including some who present no apparent national security risk and to whom the U.S. is sympathetic”¹⁰⁴ Similarly, Husarska (2008) argues that the lack of these elements allows the legislation to bar individuals who have directly supported U.S. missions. Such is the case of Saman Kareem Ahmad, a Kurdish translator working for the U.S. marines—even at times in Quantico, Virginia—who was barred for his involvement in the Kurdish Democratic Party,¹⁰⁵ an organization which was arguably abetted by U.S. actions in Iraq. In a 2007 testimony before the Senate Committee on the Judiciary Subcommittee on Human Rights and the Law, both HRF attorney Anwen Hughes and Bishop Thomas Wenski express concern for the lack of national security considerations, especially pertaining to refugee and asylum cases of material support.¹⁰⁶

As a result of such criticisms, HRF’s report and the Refugee Protection Act of 2010 make similar proposals regarding the introduction of intent and national security elements into the Tier III provision. Specifically, they recommend the exclusion from the language of the INA activities which are not unlawful under international law and which are not against noncombatant civilians,¹⁰⁷ or activities which are not for the purposes of intimidation (or

¹⁰³ Immigration and Nationality Act. 8 U.S.C. 1182 §219.

¹⁰⁴ Nezer, Melanie, Janet Dench, and Glynis Williams. (2010.) “Security and Terrorism-Related Inadmissibility: Impact on Refugee Resettlement to the U.S. and Canada.” *The Law and Society Association*: 3.

¹⁰⁵ Husarska, Anna. (2008.) “Exile Off Main Street: Refugees and America’s Ingratitude.” *World Affairs*, Summer 2008: 89.

¹⁰⁶ U.S. Congress. Senate. Committee on the Judiciary Subcommittee on Human Rights and the Law. 2007. *The “Material Support” Bar: Denying Refuge to the Persecuted?* 110th Cong. 1st Session. Sept 19 2007: 19-22.

¹⁰⁷ Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 12.

coercion),¹⁰⁸ respectively. The report and the Refugee Act thereby implicitly argue that those activities which are unlawful under international law or which are undertaken against noncombatants or for the purposes of intimidation fulfill the appropriate criteria for consideration as “terrorism.” Such requirements narrow the scope of the provision in such a way that those barred would pose explicit risk.¹⁰⁹

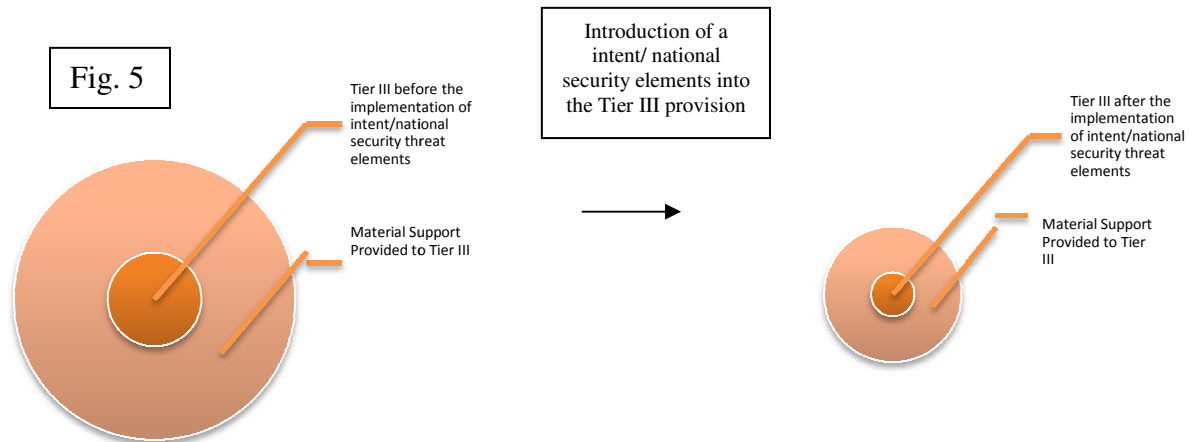
The implementation of this proposal would likely be by legislative amendment directly into the Tier III definition of a terrorist organization. This is evident in HRF’s method of recommendation. HRF makes the recommendation directly to Congress, who does not have the authority to interpret the legislation with regard to immigration cases, but writes and enacts the relevant provisions. The Refugee Protection Act of 2010 also proposed to modify the language of the INA, not to alter the interpretation of it. However it is not clear whether the intent and national security exceptions would be directed at individuals or at entire groups.

Impact

By excluding individuals who do not demonstrate intent to perform terrorist activity or who do not represent a national security threat to the U.S., the *Intent/National Security Proposal* shrinks the inner circle in Figure 1, depicted below in Figure 5. By systematically excluding any groups otherwise meeting the Tier III criteria but demonstrating no intent to harm and posing no national security risk, this proposal creates a *direct* impact on the Tier III definition of a terrorist organization.

¹⁰⁸ The Refugee Protection Act 2010 §4(2).

¹⁰⁹ The Refugee Protection Act of 2010 and HRF both recommend the disuse of the definition of Tier III entirely, discussed in Proposal 8, below, however both also recommend that the extent of activities considered terrorist be narrowed as described above, and thus considering the two—riddance of Tier III and introduction of national security concerns—as wholly distinct proposals is appropriate.



When the inner circle of Figure 5 is reduced, the outer circle representing material support provided to undesigned terrorist organizations is also reduced proportionally because groups to whom material support was provided no longer constitute Tier III organizations. Consequently, the material support provided to those organizations is no longer inadmissible. As a result, this proposal constitutes an *indirect* impact on the effective bars to refugee and asylum by reducing the breadth of the material support provision which most often bars them.

Because the intent and national security elements that are the subject of this proposal would be introduced into the statutory TRIG language of the INA, the case backlog would likely be *reduced*. This is because consular and immigration officials would be accorded discretion in determining whether or not intent and national security concerns are present. There would not be case review by immigration courts, and groups or individuals which do not represent national security threats or intend to conduct activities in the U.S. or harm U.S. citizens would be permitted to enter the U.S.

However, the issue of determining a national security threat is both complex and sensitive, and often involves a good deal of interagency consultation and communication. Thus with regard specifically to immigrants representing threats to national security, significant review

of Tier III decisions to consider the presence or not of a national security threat is likely to require agency and interagency review. This type of review is different from the current review of immigration cases which involve primarily DHS and DOJ, and sometimes DOS, or simply review of a principal. National security decision-making could also involve the National Security Council and other White House or executive offices. Therefore it could be argued that rather than reducing the case backlog, the introduction of national security elements into the Tier III provision could *exacerbate* the administrative backlog of cases by involving more agencies in individual cases.

Table V.C.5	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 5: Intent/ National Security	Direct	Indirect	Exacerbated/ Reduced

Notably, it is also possible to conceive of an interpretive change method to introducing national security/intent into the Tier III provision, much like that recommended in Proposal 3 for the introduction of a *de minimis* level of support. Such would constitute no change in the case backlog, as cases would undergo administrative and judicial review to consider whether intent or national security threats are present/credible. Such a proposal would still constitute a direct effect on the definition of a Tier III terrorist organization and an indirect impact on the effective bars to refugee and asylum, but because of the discretion accorded to courts and reviewing officials would reduce the number of Tier III inadmissibilities to a lesser extent. However, this interpretive case is not the implementation method proposed.

6. *Do not apply the Tier III provision retroactively, that is to groups which have given up terrorist activities or for activities which ceased prior to the enactment of the relevant legislation.*

Because the Tier III provision can be enacted retroactively—applied to groups who have ceased to carry out violent activities and to activities which took place before the enactment of the legislation, a larger number of immigration cases have been barred by Tier III than would otherwise be the case. One of the most commonly cited flaws with regard to the breadth of the Tier III definition of a terrorist organization is its retroactive application to organizations no longer participating in terrorist activity, as well as to activities which took place well before the October 2001 enactment of the USA PATRIOT Act. In some cases, determining the inadmissibility for groups or individuals for whom the bars have been enacted retroactively has resulted in archival research to produce exemptions for persons living in the U.S. for decades.¹¹⁰ The retroactive application of Tier III to activities undertaken by the ANC during apartheid is what resulted in the politically embarrassing inadmissibility of Nelson Mandela and a former South African Ambassador to the U.S.¹¹¹

Retroactive application of the Tier III and related inadmissibility provisions is especially problematic in cases where individuals achieved immigration status prior to the enactment of the USA PATRIOT Act of 2001 or the Real ID Act of 2005, and are attempting, post-enactment, to bring families to join them or to change immigration status. In such instances, activities which bar them from obtaining immigration status under the Tier III or material support provisions were irrelevant during the first immigration application.

¹¹⁰Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.”November 2009: 7.

¹¹¹ *Ibid.*, 28.

HRF explicitly recommends to the DOS, DHS, and DOJ that the Tier III provision cease to apply to groups which have given up violence.¹¹² Georgetown University similarly proposes that a “time bar” be imposed by Congress and interpreted into the provision by DHS. This would exclude material support provided in the past beyond a certain time limit.^{[113][114]} HRF maintains that individuals who pose a risk to the U.S. as a result of activities taking place prior to the enactment of the legislation may be barred by statutes other than Tier III, and that the growing list of defunct groups barred by Tier III serves no national security purpose.¹¹⁵ Furthermore, HRF argues that in cases where the provision is applied retroactively, the reviewing agencies should confirm the individual’s involvement in the activities, as well as the group’s sanction of the activities to ensure that individual acts of violence are not wrongly attributed to entire groups of people.^{[116][117]}

The proposal that the Tier III provision should not be applied retroactively could be implemented through interpretive changes, wherein the statutory language itself remains unchanged but agencies and immigration officials do not consider those activities/groups prior to the enactment of the relevant legislation. It could also be implemented by the addition of language into the Tier III provision through legislative amendment. Both would limit the

¹¹² *Ibid.*

¹¹³ Fleming, Mark, Emi McLean and Amanda Taub, eds. (2006) “Unintended Consequences: Refugee Victims of the War on Terror.” Georgetown University Law Center Human Rights Institute Refugee Fact-Finding Mission. May 2006: 8.

¹¹⁴ Georgetown University’s Fact-Finding report also applies the phrase “time bar” to the recommendation precluding support provided prior to an appropriate age of consent.

¹¹⁵ Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 12, 28.

¹¹⁶ Similarly, Human Rights First argues that Tier III organizations should only be deemed so as the result of actions of a subgroup when these actions are integral to the operations of the larger group, which will prevent the labeling of peaceful political parties. This constitutes a wholly separate, but related, proposal which is not considered here because it implies that the determination of a group as Tier III is incorrect in some instances. For the purposes of this research, one must assume that a provision is interpreted correctly in all instances.

¹¹⁷ In a related but unique recommendation for modifications to the material support provisions, Georgetown University Law Center’s Human Rights Institute’s Refugee Fact-Finding Investigation proposes that the material support provision only be applied to organizations already labeled Tier III, and not to individuals providing support to organizations which could be considered Tier III but which have not yet been determined to qualify as such.

application of Tier III to ongoing activities or activities which took place after the enactment of the relevant legislation.

Impact

In the case of either method of implementation, the impact of the non-retroactivity proposal would be the same. Because the proposal would exclude defunct groups and a number of past activities from determination as an undesignated terrorist organization, it would shrink the inner circle of Figure 1. However, this does not constitute a systematic limitation of the definition of a Tier III terrorist organization. The characteristics of groups whose activities took place prior to the enactment of the legislation is not necessarily categorically distinct from the activities undertaken by groups after the enactment of the legislation. The difference is only one of timing. Accordingly there is no change to the philosophy of the Tier III definition of a terrorist organization. The alleged over-breadth of the definition itself would not be corrected, despite the reduction in the number of cases of Tier III inadmissibility, and so Criticism 1 is classified as *unchanged*.

Given that the shrinking of the inner circle proportionally reduces the outer, material support circle, the narrowing of the definition of Tier III to exclude such past activities *indirectly* limits the effective bars to refugees and asylum seekers by reducing the material support inadmissibility proportional to the number of groups removed from the Tier III determination.

Regardless of whether the non-retroactivity language is written into the legislation or implemented merely through an interpretive adjustment, the case backlog would be *reduced*. The method of implementation is irrelevant because it is a simple task to determine whether the relevant activities took place before a certain date, and thus authority to determine such is easily delegated to field officers reviewing immigration applications. Even if such determinations are

required to be reported to principals or to the interagency, such determinations are unlikely to require extensive review. After the implementation of the *non-retroactivity proposal*, all cases of Tier III activities taking place prior to the enactment of the relevant legislation would no longer be considered inadmissible, and so the accumulation of immigration cases would be reduced. The impact on Criticism 3 is accordingly classified as *reduced*.

Table V.C.6	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 6: Non- Retroactivity	Unchanged	Indirect	Reduced

7. Introduction of a “designated” list of Tier III terrorist organizations.

While there have been no official recommendations to impose a Tier III ‘designation list,’ the lack thereof is significant and is the primary difference between the Tier I and Tier II designations and the Tier III determination. The closest recommendation to the institution of a designation list comes from Georgetown University’s Fact-Finding Investigation, which recommended to Congress that the U.S. government “certify” a Tier III terrorist organization before material support provided to the organization may be considered inadmissible.¹¹⁸ Thus the effect of implementing a designation list is worth exploring.

Certainly there is an inherent trade-off between the public nature of a designation list and the discretion accorded to government officials by the current use of the Tier III definition. If a designation list were created, to designate an organization as Tier III would likely require a good

¹¹⁸ The method of “certification” is unspecified. The distinction between certification and designation is also unclear, although it is possible that a certification list would consider only Tier III organizations which have already been determined by prior immigration cases, and not create a list of organizations from outside sources, as a designation list would.

deal of effort on the part of officials hoping to bar an individual/group under the provision. Thus discretion is inherently limited. It would also become an even more political event to make a Tier III determination than it is currently if a designation list were created. The primary goal of a terrorist designation list is the result of its being made public, which may act through persuasion or punishment as leverage against the organizations named.¹¹⁹ To avoid such political consequences (and to protect the privacy of individuals undergoing immigration processing), when a Federal judge recently asked DHS to file a list of organizations which were being considered undesignated terrorist organizations, DHS filed the list confidentially.¹²⁰

Impact

In the event of the introduction of a designated list of Tier III terrorist organizations, the number of organizations considered to be Tier III is likely to be reduced. How much it is reduced depends on how many organizations are designated, which in turn depends on the political impact of designating an organization as Tier III and the bureaucratic processes required to perform the designation. It is possible to imagine that the number of Tier III designations would not be reduced at all from its current size, if every organization which could be labeled Tier III under the current definition was designated. (This possibility is represented in Table V.C.7 by the “*”). However, the likelihood of such a coincidence is very small, and thus here we will presume that a designated list would reduce the number of Tier III determinations.

While the introduction of a designated list does not systematically narrow the definition, the public nature of the list as well as the bureaucratic processes of deliberation would probably serve to limit the extent of the Tier III definition. Without changes to the language of the INA’s

¹¹⁹ Oudraat, Chantal De Jonge and Jean-Luc Marret. 2010. “The Uses and Abuses of Terrorist Designation Lists.” In *Legal Issues in the Struggle Against Terror*, eds. John Norton Moore and Robert F. Turner. Durham, NC: Carolina Academic Press.

¹²⁰ Human Rights First. (2009.) “Denial and Delay: The Impact of the Immigration Law’s “Terrorism Bars” on Asylum Seekers and Refugees in the United States.” November 2009: 26.

Tier III provision, any groups which are subsumed by the wide berth of the current definition would still be eligible to be designated. However, the creation of a designation list would necessitate the creation of a process and standards for designation, which would limit the Tier III inadmissibility. One could consequently assume that the creation of a list would limit the impact of Tier III. For instance, it is unlikely that the African National Congress would have been added to a designation list after 2001 as a Tier III terrorist organization. Thus classification of the impact on the definition of a Tier III terrorist organization is *indirect*, as the extent of the provision is systematically limited, but not through definitional changes.

It is clear that the impact on the effective bars to refugees and asylum seekers would also be classified as *indirect*, as when the number of Tier III determinations is reduced, the material support bar's impact is also minimized proportionally.

While the production of a designated list would require massive bureaucratic effort, as would the addition/subtraction of a group from the list, the actual number of immigration cases contributing to the administrative backlog would be *reduced* inversely proportional to the number of groups designated. The more groups designated, the less the backlog is reduced (or the more Tier III cases which would be required undergo immigration proceedings, court review, etc.).

Table V.C.7	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 7: Designated List	Indirect*	Indirect*	Reduced*

*Represents the possibility that no change will occur if all the potential Tier III organizations were to be designated as such.

8. *Removal of the Tier III provision.*

The most drastic of the recommendations to modify the Tier III and related inadmissibility provisions is to completely repeal it. Both the Refugee Protection Act of 2010, sponsored by Senator Patrick Leahy D-VT, and HRF's report argue for the repeal of the Tier III statutory provision by an amendment to the INA.¹²¹ The proposal to remove the Tier III provision entirely has been put forth chiefly by groups and individuals concerned for the welfare of refugees (e.g. HRF, implicitly by Erica Feller of the Office of the United Nations High Commissioner for Refugees, Senator Leahy D-VT through his sponsorship of the Refugee Protection Act of 2010).

HRF's report argues that for individuals who do pose a direct threat to the U.S., statutory bars already exist to bar them from immigration privileges, thus highlighting the redundancy of the Tier III provision. "Involvement with armed groups engaged in hostilities against the United States could also trigger the separate statutory bar excluding from protection anyone whom 'there are reasonable grounds for regarding...as a danger to the security of the United States.'"¹²² Feller (2006) argues that legislation also exists in international law already to prevent abuse of the refugee and asylum systems, and thus the legislation, such as the TRIG provisions, imposed on refugees and asylum seekers by the U.S. and other states is unnecessarily broad and outmoded.¹²³

¹²¹ The Refugee Protection Act of 2010§4(4); Human Rights First. (2009.) "Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States."November 2009: 11.

¹²² Human Rights First. (2009.) "Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States."November 2009: 25.

¹²³ Feller, Erika. (2006.) "Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come." *International Journal of Refugee Law* (December 1, 2006).

The Refugee Protection Act of 2010 proposal to remove the statutory Tier III provision reads:

- (4) in clause (vi)—
- (A) in subclause (I), by adding “or” at the end;
 - (B) in subclause (II), by striking “; or” and inserting a period; and
 - (C) by striking subclause (III); ...¹²⁴

Impact

The removal of the Tier III provision entirely would clearly amount to a *direct*[!] impact Criticism 1 by removing the over-breadth entirely. (The “!” indicates the extreme nature of the impact, as with the implementation of this proposal, the criticisms themselves become non-existent.) The ambiguity which is the subject of Criticism 1 would be entirely removed with the removal of the Tier III provision.

If the Tier III provision were removed, it is clear that the issue of material support provided to undesignated terrorist organizations (though not to Tier I or II terrorist organizations) would also be eliminated. While the material support bar would remain, material support to Tier III organizations would no longer exist as a terrorism-related inadmissibility. Thus this would constitute an *indirect*[!] impact on the effective bars to refugee and asylum.

If the Tier III provision were eliminated, the case backlog of Tier III inadmissibilities would not merely be reduced, but would be eliminated. Thus it is classified in Table V.C.8 as *reduced*[!] to indicate the extreme nature of the reduction.

Table V.C.8	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 8: Removal of Tier III	Direct [!]	Indirect [!]	Reduced [!]

[!] Represents the extreme nature of the classifications.

¹²⁴ The Refugee Protection Act of 2010§4(4).

Review

In summary, Table V.C.9 shows the impact determinations discussed above of each of the proposals in comparison to one another.

Table V.C.9	Criticism 1: Tier III Overbreadth	Criticism 2: Refugee Bars	Criticism 3: Case Backlog
Proposal 1: No Modification	Unchanged	Unchanged	Unchanged
Proposal 2: Waiver/ Exemption Categories & Issuance	Unchanged	Unchanged/ Indirect	Reduced (exemptions); Exacerbated/ Reduced (waivers)
Proposal 3: De Minimis Support	Indirect	Direct	Unchanged
Proposal 4: Duress Exception	Indirect	Direct	Reduced
Proposal 5: Intent/ National Security	Direct	Indirect	Exacerbated/ Reduced
Proposal 6: Non- Retroactivity	Unchanged	Indirect	Reduced
Proposal 7: Designated List	Indirect*	Indirect*	Reduced*
Proposal 8: Removal of Tier III	Direct ¹	Indirect ¹	Reduced ¹

Proposal 1, for no change to the TRIG provisions, has the least impact in that none of the Criticisms 1-3 are affected, and Proposal 8 for Removal of Tier III, clearly has the greatest impact in that all three Criticisms are theoretically removed. Proposals 4, 7 and 8—for a duress exception, a designated list, and removal of Tier III, respectively—all alleviate each of the criticisms indirectly or directly. Proposal 3, or the introduction of a *de minimis* level of support, ameliorates Criticisms 1 and 2, but because it requires administrative review or court decisions to determine its applicability, it does not reduce the case backlog. Only Proposals 2 and 5 for

expanded waiver/exemption issuance and intent/national security elements, respectively, have the potential to exacerbate the case backlog as it is currently structured. In the case of Proposal 2, waivers could potentially induce longer or more reviews of Tier III cases. However, increased exemptions could reduce the case backlog. Otherwise, Proposal 2 could potentially alleviate Criticism 2, but would have no effect on Criticism 1. In contrast, Proposal 5 could alleviate all 3 criticisms except for Criticism 3, in which the potential for exacerbation of case backlog exists given the politically sensitive nature of national security concerns.

As discussed in Part B, because the majority of the spaces in Table V.C.9 indicate the alleviation of the criticisms (17 to 19 of 24), one can tentatively conclude that the implementation of proposed changes to the INA's TRIG provisions could have a positive effect on the legislation, or at least on its reputation. Only two spaces indicate a potentially adverse effect (and these are not "substantive" adverse effects, but administrative adverse effects via exacerbated case backlog), and only 5-7 spaces indicate the possibility of no change to the legislation. Three of these are the classifications for the proposal to enact no change and are thus present inherently.

D. Adoptability of Proposed Changes

Adoptability, or the first part of the “adoption→implementation→impact” framework, is the final piece of this analysis. This section is intended to complement Part C’s analysis. It will consider the potential for realization of the proposals given the potential impact explored in Part C and the opinions of relevant parties on the appropriate role of the TRIG provisions. Because there has been little discussion of specific proposals (with the exception of those in the Refugee Protection Act of 2010 and of some types of waivers) we will consider here the opinions of policymakers and legislators as expressed with regard to TRIG issues generally, and then reflect on the proposals in the context of these general opinions. Specifically, this section will first touch on issues of material support, which come primarily from a 2007 hearing on the material support bar itself, then move to a discussion of the proposed Refugee Protection Act of 2010, and end with a discussion of the waiver authority related to the TRIG provisions.

The tension between the desire for change and the protection of continued discretionary authority will permeate this section. Any policy must inherently balance the goals of discretion and efficient implementation. Because the TRIG provisions already exist with a significant degree of discretionary authority on the part of government officials, a discussion of the adoptability of the proposals will necessarily consider whether discretionary authority would be limited or expanded, and whether or not this outcome is feasible in the political climate.¹²⁵

Much of the policy debate about further modification of the Tier III and related provisions have centered on the material support bar. In a 2007 hearing before the Senate

¹²⁵ In *Street –Level Bureaucracy*, Michael Lipsky (1980) provides an extensive analysis of professional discretion accorded to street-level bureaucrats, or the “public service workers who interact directly with citizens in the execution of their work (3).” Lipsky argues that discretion is a relative concept, where sometimes over-prescription of rules prevents the professional expertise of public service workers from being positively exercised, while other times more rules are required to prevent bureaucrats from being overcome by bias.

Committee on the Judiciary Subcommittee on Human Rights and the Law, Senator Patrick Leahy D-VT, sponsor of the Refugee Protection Act of 2010, argued,

we need to bring our laws back into alignment with our values. The revisions to the material support provisions that were included in the PATRIOT Act and the REAL ID Act undermine our Nation's commitment to human rights. They are a reactionary, blunt-instrument approach to a complex issue, and fear overcame common sense and our collective conscience.¹²⁶

In response, Deputy Assistant Secretary for Policy at DHS Paul Rosenzweig argued that the material support provision is vital to national security as it currently stands, and in the event that it is misapplied, the existing waiver authority may be enacted.

Let me begin, if I may, by reiterating precisely why the material support provisions are so vital to our national security. One can define terrorism in two ways: either by listing an organization as a terrorist organization, or by defining the conduct that makes an organization a terrorist one. With respect to listing, we must recall that this Congress as well as the courts have said that such organizations are foreign organizations that engage in terrorist activity and are so tainted by their criminal conduct that any contribution to the organization is itself tainted.

With regard to a definition of terrorism by conduct, you must also remember that the listing process is cumbersome and slow, not nearly fast enough to keep up with the mutating terrorist groupings. Thus, while al Qaeda is a listed terrorist organization, its many subsidiary groups such as al Qaeda in the Magreb are not. And, thus, support for those organizations is only captured within the prohibition about broader conduct definitions.

Now, all that having been said, we are well aware at the Department that the material support bar has the potential to sweep too broadly and to prevent us from providing immigration benefits to those who are deserving of them and to whom the United States is and ought to be willing to provide refuge. Since my last testimony before the House in May of 2006, the administration has made substantial progress in assessing the material support problem and providing exemptions where appropriate.¹²⁷

If Rosenzweig's testimony as Deputy Assistant Secretary for Policy at DHS is representative of overall agency opinion, it is possible to conclude that proposals which limit or effectively eliminate the material support to Tier III organizations are undesirable to DHS

¹²⁶ U.S. Congress. Senate. Committee on the Judiciary Subcommittee on Human Rights and the Law. 2007. *The "Material Support" Bar: Denying Refuge to the Persecuted?* 110th Cong. 1st Session. September 19, 2007: 5.

¹²⁷ *Ibid.*, 6-7.

officials, and less likely to be implemented given DHS' major role in the implementation of TRIG provisions. Thus Proposals 3 and 4 will be resisted (as well as 2 and 5-8 to some extent, though these do not directly impact the material support provision, and/or may be resisted by DHS for other reasons). Though these officials do not legislate (and thus could not, without assistance from the Chief Executive or the Judiciary, block a majority-favored amendment) it is reasonable to conclude that such proposals will be considered less viable if the professional opinion of DHS officials is valued highly enough.

Rosenzweig's 2007 argument was, at its core, an argument for the continued discretionary authority of the executive agencies. He clearly advocates continued use of exemption authority over legislative change. Three years later, in a hearing before the Senate Committee on the Judiciary, Associate of Paul, Hastings, Janofsky & Walker, LLP in Washington, D.C., Igor V. Timofeyev, argued in the same vein of continued discretionary authority against the proposals of the Refugee Protection Act of 2010. The Act proposed to eliminate the statutory Tier III provision, as well as to institute an exception for material support provided under duress.¹²⁸ Timofeyev maintained that the amendments proposed by the Act would "restrict the Executive's ability to respond to the rapidly mutating nature of terrorist threats."¹²⁹ He noted the opportunity inherent in broadly written immigration legislation: "whenever you have a provision in the law which is admittedly broad, it also means it gives the government a broader or better ability to actually keep the people who we do not want in this country out."¹³⁰

¹²⁸ The Refugee Protection Act of 2010 §4.

¹²⁹ U.S. Congress. Senate. Committee on the Judiciary. 2010. *Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010*. 111th Cong. 2nd Session. May 19, 2010: 12.

¹³⁰ *Ibid*, 15.

In response to concerns about the Refugee Protection Act of 2010, President of Refugees International and former member of Congress Dan Glickman argued that the legislation would not allow terrorists access to the U.S. immigration system despite the eliminations and modifications proposed by the Act, but did not directly address concern for discretionary authority.¹³¹ Contrastingly, Timofeyev dramatically predicted that elimination of bars to material support for undesignated terrorist groups (via the elimination of the Tier III provision) would lead to the necessary designation of such organizations as Tier I or II in order to prevent individuals gaining access to the refugee/immigration systems. Timofeyev, like Rosenzweig in 2007, preferred the waiver process for correcting inappropriate inadmissibility findings to the complete elimination of the Tier III inadmissibility.¹³²

The waiver authority was instituted by Congress, and it is clearly the preferred method of DHS officials for resolving the effective bars to refugees and asylum seekers, as well as the overbreadth of the definition of an undesignated terrorist organization. In an extreme instance, Rosenzweig even advocated for the dramatic expansion of DHS's waiver authority (but not for any corresponding statutory reform).

...the administration has submitted a legislative proposal, the details of which get into the intricacies of sub-sections and sub-sub-sections of the INA. But, broadly speaking, today the exemption authority that the Secretary of State and the Secretary of Homeland Security have is limited to just a few subsets of terrorist-based exemptions. We may exempt, for example, material support provisions. We may also exempt from that people who are representatives of other groups who espouse—who engage in political speech. We lack the authority to waive the application with respect to INA 212(a)(3)(B)—I think that is right—which is the provision that prohibits us from admitting anybody who has carried arms. The structure of the administration's proposal is essentially to take off all those limitations and to say, as broad as is the exclusion authority for people who engage in support or otherwise are related to terrorist activity, make our exemption authority

¹³¹ *Ibid*, 14-15.

¹³² *Ibid*, 19.

identically commensurate. If you do that, we will be able to exercise that authority with respect to the people who have yet to have the relief that they have sought.¹³³

In 2010, Timofeyev argued similarly to Rosenzweig that the waiver authority, in addition to already being available to a number of categories of persons, allows greater discretion to governmental officials while providing the same type of relief from the provision when enacted as would statutory reform.

Importantly, unlike the proposed bill, the waiver authority permits the Executive to impose additional restrictions on these exemptions, such as the requirement that the applicant had not participated in, or provided material support to, activities that targeted noncombatant civilians. The existing waiver process also permits the Executive to obtain, where necessary, an all-source evaluation of the group to which the applicant provided support, and of its aims and methods, including its coercion techniques. In addition, the existing waivers provide adjudicators with discretion to evaluate the totality of the applicant's circumstances when deciding whether to grant an exemption.¹³⁴

However, the waiver/exemption authority has not been free of grievances. In testimony before the Senate Judiciary Committee on May 6, 2009, and in response to Congresspersons dissatisfaction with its implementation of the waiver authority, Secretary Napolitano merely promised to "review" the waiver authority (which was not expanded to reflect Rosenzweig's 2007 suggestions).¹³⁵

By 2010 Congresspersons (as well as civil society) were still unimpressed with both the speed of the implementation of the waiver authority and the extent of its use. An exchange between Chairman Leahy and Timofeyev during the May 2010 hearing is important in illustrating the generally mutual concern for overbroad application of TRIG provisions and the resultant necessity of waivers, but the disagreement over their implementation and use.

¹³³ U.S. Congress. Senate. Committee on the Judiciary Subcommittee on Human Rights and the Law. 2007. *The "Material Support" Bar: Denying Refuge to the Persecuted?* 110th Cong. 1st Session. September 19, 2007: 10-11.

¹³⁴ Timofeyev, Igor V. (Associate at Paul, Hastings, Janofsky & Walker, LLP.) "Statement before the United States Senate Committee on the Judiciary Hearing on Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010." May 19, 2010: 4.

¹³⁵ U.S. Congress. Senate. Committee on the Judiciary. 2010. *Oversight of the Department of Homeland Security*. 111th Cong. 1st Session. May 6, 2009: 14-15.

Chairman LEAHY. And, Mr. Timofeyev, you mentioned the waiver and exemption authority to the material support bar. Those amendments were written by Senator Kyl and myself.

You are correct in saying the implementation of the waiver process has been slow; 6,000 cases are still stuck in limbo. That is why I tend to disagree with you that a change in the statute is unnecessary.

But I think there is one area we should agree on. You mentioned the waiver authority can be improved for individuals in immigration court proceedings.

What are some of the things that they could do to improve it? Assuming we keep with the present law, what are some of the things we could do to improve it and get past that 6,000 case backlog?

Mr. TIMOFEYEV. Mr. Chairman, first, I would like to note that I agree with Mr. Glickman that, I think, in this area, you have to proceed very carefully because of the important considerations of national security....

With respect to your immediate question, I agree, as you mentioned, that the waiver process should have been implemented faster. I think, particularly, from 2006, when I was in the Bush Administration, we slowly put that process underway.

I think now the executive has significant history, significant experience in how to operate that process in a way that comports with national security, but allows admission and application of waivers to deserving individuals.

I think with respect to, specifically, immigration court processing, one suggestion I would make, which I do not believe is yet the case, is I think there should be a way to allow for an adjudication of these waivers early in the process, not waiting until an individual who is in removal proceedings has his final order of deportation.

I think it should be feasible to have a system where the consideration of whether or not that individual is eligible for a waiver of material support of other terrorist admissibility bars can be made early in the process.

I think that is one concrete suggestion that under the legislation that, as you mentioned, you and Senator Kyl worked on, the executive currently has authority to do.¹³⁶

Timofeyev further argued that the exemption authority allows the administration to respond to case-by-case and unforeseen issues, and such is why the implementation of waiver authority was slow.¹³⁷

¹³⁶ U.S. Congress. Senate. Committee on the Judiciary. 2010. *Renewing America's Commitment to the Refugee Convention: The Refugee Protection Act of 2010*. 111th Cong. 2nd Session. May 19, 2010: 14-15.

It is clear, despite the nuances of the debate, that the waiver authority is favored by those advocating for discretionary authority (as the sole or sufficient solution) as well as those advocating for the elimination of bars to legitimate refugee and asylum claims (generally as part of a broader schemata of proposals). Thus Proposal 2 appears viable, though it was not among the most impactful proposals per the evaluation in Part C.

These few brief statements outline the primary, public discussions being had in the policy community about the nature of the Tier III and related inadmissibility statutes and potential changes to be made. It is clear both through these statements and the impact analysis above, that change is desirable, but the extent and method is hotly debated. Even in the statements of those most concerned with discretionary authority—e.g. those more likely to be opposed to changes that lessen the discretionary authority currently allotted by the TRIG provisions—one detects concern for instances in which Tier III should not apply (by that individual’s moral or political judgment) and yet is enacted. Accordingly, changes to the TRIG statutes which might prevent this from happening or limit its occurrence are favorable to persons all along the continuum of the debate. Therefore Proposal 1 which does not suggest any change and does not make an effort to correct any current misapplication of Tier III is unlikely to be favored by most parties to the debate.

As a result of the adaptability analysis, some conclusions can be reached. For instance, Proposal 2 for expansion of the waiver/exemption authority would be the clear favorite among DHS officials given its preservation of discretionary authority and its ability to address ongoing criticisms. However, Congresspersons and civil society are likely to desire more action than waiver issuance as a result of ongoing grievance with the current state of the waiver/exemption

¹³⁷ U.S. Congress. Senate. Committee on the Judiciary Subcommittee on Human Rights and the Law. 2007. *The “Material Support” Bar: Denying Refuge to the Persecuted?* 110th Cong. 1st Session. September 19, 2007: 10-11.

authority. “More action” might come in the form of Proposals 3-8. However, as noted previously, limitations imposed on the material support bar are unfavorable to DHS officials, at least in comparison to the use of waivers/exemptions, so Proposals 3 and 4 which directly limit the material support provision and 5-8 which indirectly limit it are likely to be resisted. (Proposal 8 would remove the inadmissibility for support to Tier III organizations completely.)

Beyond these conclusions, it is necessary to estimate the Congressional and agency opinions regarding the proposals. For instance, we are unsure how the DHS officials who testified might view the institution of intent or national security elements into the Tier III definition. However, it is possible to conjecture that because such a direct modification to the statutory language would limit discretionary authority in cases where a direct threat to national security cannot be found and/or intent cannot be proven, DHS officials would find such a change unfavorable at this time. Congresspersons, being pressured by civil society, might favor the proposal. In a similar fashion, the limitations to discretion imposed by the *Non-Retroactivity Proposal* which precludes any activity taking place prior to a certain date; the *Designated List Proposal* which would require that the organization be on or added to the list to be considered inadmissible under Tier III in any given immigration case; and the *Removal of Tier III Proposal*, would likely be unacceptable to agency or adjudicating officials.

One important final note is that it is very unclear how the interpretive changes proposed in the *de minimis proposal* (3) or in the *retroactivity proposal* (6) are viewed by the policy communities. Such interpretations have amounted to successful defenses in immigration courts, but it is unknown how, for instance, the issuance of a directive allowing for the interpretation of such would fare in Congress or at the Department of Homeland Security. Given that such proposals would retain discretionary authority and that they would serve to limit the extent of the

damage done by the three primary criticisms in immigration cases, they might be viewed similarly to the proposals for expanded waiver and exemption authority. However, because they are less well-defined than the codifications which constitute exemptions and waivers, it is possible that they would be less favored by Congress in its oversight function, and by individuals reviewing and adjudicating immigration cases because of the inherent ambiguity and lack of legislative support.

VI. Recommendations

Using the impact analysis in Part C, and the brief consideration of adoptability in Part D, this section will put forth a recommendation for which of the proposed policies should be adopted.

Part D made clear the fact that changes to the waiver authority are desired, and are the most politically viable of the contending policy options. This project therefore proposes that implementation of changes to the TRIG statutes begin with changes to the waiver authority (Proposal 2) which will extend waivers to new classes of Tier III cases. Because expansion of the waiver authority would likely induce a greater accumulation and delay of immigration cases, this should not be a permanent solution. Consequently, this recommendation also suggests that the expanded waiver authority be available to the three relevant principals (the Secretaries of State and Homeland Security and the Attorney General) and that the authority be delegated to appropriate government officials which should serve to limit delays. There should also be continued issuance of categorical exemptions for whom the Tier III determination is considered unjust or inappropriate. Because Proposal 2 did not show the potential to impact the primary criticism of the TRIG provisions (Criticism 1), after a period of successful implementation of these authorities, a review of their use and success should determine which of the other proposals should be adopted. The adoption of further proposals is contingent upon the effects of the expansion of the waiver authority.

Firstly, the waiver authority should be made to extend to different types of TRIG cases (e.g. material support provided inadvertently or cases of terrorist activity taking place prior to 2001). As advocated by Paul Rosenzweig in 2007, this proposal recommends that the totality of the waiver authority be as broad as the exclusion authority represented by the TRIG provisions.

Such allows the legislative provisions to maintain the broadest possible application authority, but also accords additional authority and discretion to government officials to determine the provisions inapplicable in certain cases.

The institution of such a proposal should proceed by analyzing what types of cases are currently held in immigration proceedings—whether most are persons who were involved directly with an undesignated terrorist organization or who provided material support to one. In the case of an individual who was a member of a Tier III organization, it should be noted whether the provision was applied retroactively in his case, or whether the elements of national security threat or intent are present. In the cases of material support, it is important to consider whether the support was provided under duress, at an insignificant level, inadvertently, or by a child or a relative of the individual to whom the support was given.¹³⁸

While these determinations are somewhat subjective, consideration of the number of cases which qualify for certain types of waivers is important for deciding which types of waiver authorities to create and in what order they should be created—the most common types of cases should receive waiver authority first. It is necessary for the efficient exercise of the authority to issue separate waivers for each type of case, though in the end the total waiver authority should mirror the exclusion authority. The proposals considered in this analysis are an excellent source for types of waiver authority to consider, given that they represent aspects of the TRIG statutes which are the most disagreeable or problematic and for which waivers would be most useful.

The following is a list of the waiver authorities which should be produced and be made available to the Secretaries of State and Homeland Security as well as the Attorney General—or to those principals with authority at different stages of the immigration process. (These

¹³⁸ Such research likely already exists in the immigration and visa files of the applicants, as well as in the form of reports such as the one produced by Georgetown University Law Center and Human Rights First. The potentially biased nature of such reports should, of course, be considered.

suggestions are made based on the research performed as part of this project, and the proposals made so far in the literature. However, the list should be altered based on the findings of the case-specific research suggested above.) They are divided into two categories: waivers for aspects of the material support provision (§212(a)(3)(B)(iv)(VI)) and waivers for aspects of the Tier III provision (§212(a)(3)(B)(vi)(III)).

Related to Material Support:

- A waiver for material support provided at or below a *de minimis* level of support (as determined on a case-by-case basis by the consular or immigration officials reviewing the case and reviewed by a principal or an individual with his/her delegated authority).
- A waiver for material support provided under duress.
- A waiver for material support provided inadvertently.
- A waiver for material support provided below an age at which consent can be freely given.
- A waiver for material support provided to a member of a Tier III terrorist organization by a relative of that individual.

Related to the Tier III provision:

- A waiver for cases in which there is no threat to national security nor credible intent to inflict harm on the U.S., its infrastructure, or its citizenry.
- A waiver for cases in which the Tier III provision is applied retroactively.

These waivers should be exercised, as are currently available waivers, only in cases where the totality of the circumstances merits the exception—that is where the only bar to the individual’s admissibility is the one which the waiver resolves, and where immigration officials have no outstanding concerns. One should not expect this proposed expansion of the waiver authority to be as contentious as proposals to modify the statutory authority to reflect the content of the above proposed waivers. This is because the waivers expand the authority of officials to determine the relevant bar inapplicable, but they do not remove the authority to apply the bar in the first place. Therefore, discretion is actually expanded with the proliferation of waivers, and not decreased as it could be with the implementation of similar statutory reforms.

One glaring issue, as noted in Part C, is that the expansion of the waiver authority has the potential to exacerbate an already problematic accumulation of cases in immigration proceedings. This is why the waiver authority should be delegated to more government officials than just the principals, and why the modification is merely the first of the here-proposed steps to modify the TRIG provisions.

The waivers for various types of TRIG cases, as opposed to categorical exemptions to Tier III groups, have more wide-reaching effects and accord greater discretion to adjudicating officials. This is because the waivers may also apply to members of groups eligible for categorical exemptions, and do not limit their exercise only to specific groups of people. However, the continued issuance of exemptions to various groups is useful in the political arena and is a complement to the proposed expansion of the waiver authority. It provides a public acknowledgment of either a mistaken application of TRIG provisions or of the inapplicability of the provisions in that case—given the merits of the groups’ cause, the circumstances under which the relevant events took place, the U.S.’s political concerns or any other number of relevant instances. Therefore the issuance of categorical exemptions should continue as cases of groups inappropriately determined inadmissible by the Tier III provision continue to arise. The determination of which groups are eligible should be left to the experts at DOS, DHS, and DOJ who possess the relevant intelligence, political awareness and resources, and historical and institutional knowledge.

After this proposed expansion of the waiver/exemption authority has been implemented for a significant period of time during which its exercise becomes routine, consideration of further modification to the TRIG provisions can be had. At this point, records will exist for the instances in which the waiver authority is exercised. The statutory changes corresponding to

those types of waivers used most commonly and successfully—with little controversy and with fair efficiency—should be implemented. (These may require the creation of different proposals than those explored as part of this project, for instance the implementation of an exception for inadvertently provided material support.) This secondary wave of change can also be implemented slowly, with regard to the discretionary authority of adjudicating officials. For example, a waiver which has only been used once or twice would not be appropriate to institute as a statutory reform, as the discretionary authority continues to be necessary.

Given that the waiver authority produces an accumulation of immigration cases under review, further modification of the TRIG provisions should aim to phase out the necessity of the waiver authority. For instance, if the waiver for material support provided under duress is exercised most often, the Proposal to institute a duress exception (Proposal 4) should be implemented. This shifts the burden from immigration court proceedings and principal review outward to consular and immigration officials in the field, receiving applications for immigration status. Ultimately, the reduction in case backlog and the improvements regarding Criticisms 1 and 2 as a result of these statutory reforms represent ameliorative changes to the legislation with sensitivity both to discretion and to the most common criticisms.

It is impossible to speculate which of the waiver authorities will be used most often with any degree of certainty without access to immigration case records. It is also difficult to guess how, given successful implementation of the waiver authority, the support for a corresponding proposal (e.g. proposals 3-6) will change, if at all. The hope is that with frequent and successful exercise of the waiver authority, the corresponding proposal will come to seem less drastic and more viable than it is currently, given the discussions reviewed by Part D. The more drastic impact will come with the implementation of these later proposals. The statutory/interpretive

reform will result in more instances of use as they are not subject to discretionary implementation. This will also appease some of the main critics of the legislation, especially with regard to the over-breadth of the Tier III definition and the effective bars to refugee and asylum, or Criticisms 1 and 2.

This analysis illustrates the overall impracticality of Proposals 1 and 8. Proposal 1, as noted above, is favored neither by those wishing to produce radical change in the TRIG provisions, nor by those hoping to maintain discretionary authority. Proposal 8 was argued against directly in the Senate Committee Hearing on the Refugee Protection Act of 2010 in which it was proposed. Despite its drastic impact on the three primary criticisms of the legislation, it is not a politically viable solution at this time.

This analysis also illustrates the difficulty of instituting Proposals 3-7 without the institution of the preliminary, corresponding waiver authority, the conclusions regarding which are more nuanced, as they sit along the continuum of limiting discretionary authority and producing ameliorative change with respect to the primary criticisms of the TRIG provisions. Based on the exploration of adoptability in Part D, those proposals which restrict the definitions of an undesignated terrorist organization (3, 4 and potentially 7 indirectly, and 5 directly) and which limit the applicability of the material support provision (3 and 4 directly, 5, 6 and potentially 7 indirectly) are unfavorable to DHS officials on the grounds that discretionary authority is too severely restricted. However, each is potentially able to produce changes to the TRIG provisions favorable to civil society, Congress, and even DHS and other agency officials in particular cases (i.e. cases where the TRIG provisions are seen as unfairly or irrationally applied). Proposals 4, 5, and 7 have the potential to ameliorate all three criticisms, while 3 and 6 would alleviate two of the three.

In order to know which of Proposals 3 through 6 are more viable—on grounds other than their affect on discretionary authority—the institution of an expanded waiver authority will be helpful as a test of usefulness and viability. This test, in proving the viability of some proposals, will be productive in reducing resistance to them, thus making the more adoptable than they are currently. Proposal 7 would not be tested by the institution of this waiver authority. However, its implementation would likely eliminate almost all discretionary authority except in the creation/modification of the list itself, and thus its adoption is highly unlikely in the near future, even after a trial period.

In conclusion, it is clear that the most acceptable proposal is currently Proposal 2 for the expansion of waiver/exemption authority. This expansion allows some of the criticisms of the legislation to be alleviated. It would limit the number of cases of material support inadmissibility, and while it would not systematically limit the Tier III definition, it would shrink the net of Tier III cases. The institution of expanded waivers might initially increase the bureaucratic case backlog, but such appears a necessary and acceptable trade-off for the retention of discretionary authority. This expanded waiver/exemption authority should be followed by more drastic changes, or the institution of the statutory reforms corresponding to the successfully implemented waiver authority. The implementation of changes would reflect a boost of the Tier III and related inadmissibility's reputation in the academic and policy communities, and the recommendations offered here provide a method through which discretion can be maintained while simultaneously positive changes may be enacted.

Perhaps if these changes had been implemented earlier, Nelson Mandela may not have been barred from entry to the U.S. by the TRIG provisions. Saman Kareem Ahmad may have been granted asylum after his assistance to the U.S. marines. With the institution of these

proposed changes, the INA's Tier III and related inadmissibilities may begin to function to bar only those representatives or supporters of terrorist organizations who truly represent a threat to the United States. With the institution of these proposed changes, the INA might more closely reflect the conscience of the U.S., which has a history of demonstrating its openness to immigrants, and which ultimately values equity and justice for all.

Appendix 1

A brief look into the social movement literature reveals a possible alternative categorization of the groups classified as Tier III terrorist organizations. Indeed conventional definitions of social movements can be argued to relate at least as closely to the Tier III definition of terrorist organizations as conventional definitions of terrorism. Several definitions of social movements are contained in Table A.1.

Table A.1	Definitions of Social Movements
Heberle (1951)*	A genuine social movement...is always integrated by a set of constitutive ideas, or an ideology, although bonds of other nature may not be absent. ...A social movement...need not be restricted to a particular state or national society. In fact, all major social movements have extended over the entire sphere of Western civilization and even beyond.
Wilkinson (1971)*	A social movement is a deliberate collective endeavor to promote change in any direction and by any means, not excluding violence, illegality, revolution or withdrawal into "utopian" community... A social movement's commitment to change, the raison d'être of its organization are founded upon the conscious volition, normative commitment to the movements aims or beliefs, and active participation on the part of the followers or members.
Tilly (1979)*	A social movement is "a sustained series of interactions between national powerholders and persons successfully claiming to speak on behalf of a constituency lacking formal representation, in the course of which those persons make publicly-visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support."

<p>Zirakzadeh (1997)**</p>	<p>A social movement has three distinct characteristics, including: 1) a group of people who consciously attempt to build a radically new social order, 2) the political activity stems from a broad range of social backgrounds, generally comprised of the ‘non-elite’ and 3) the movement utilizes politically confrontational and socially disruptive tactics.</p>
<p>Dieter-Opp (2009)***</p>	<p>A social movement is "a collectivity of actors who want to achieve their goal or goals by influencing the decisions of a target." (Dieter Opp begins with this definition and adds elements of size, longevity, and formal organization dependent upon the research.)</p>

*Tilly, Charles. 1979. "Social Movements and National Politics." Working Paper No. 197 Center for Research on Social Organization.

**Zirakzadeh, Cyrus Ernesto. 1997. *Social Movements in Politics: A Comparative Study*. New York: Longman.

***Dieter-Opp, Karl. 2009. *Theories of Political Protest and Social Movements: A Multidisciplinary Introduction, Critique, and Synthesis*. New York: Routledge.

Each of the above definitions of a social movement includes both the desire for and momentum toward political or social change. None of these definitions excludes the use of violence, political motives, or effects beyond the immediate victims, which were the three common elements to each of the terrorism definitions above. The Tier III definition then, which also does not specifically require, but does not exclude those three elements, may be considered in some ways more similar to the definitions of a social movement (dependent upon whether the social movement carries out terrorist activities as defined by the INA and included in the Tier III definition). However, it is important to recognize that each of the definitions of a social movement recognizes a motivation, generally a political or social one, and notes that the activities of the movement are generally carried out by an organized group. Therefore the Tier III definition is also, in some ways, broader than the definition of a social movement. This intersection of definitions is critically important in examining the activities of groups barred by the Tier III inadmissibility provisions.

Highlighting the overlapping nature of the definitions of social movements and the previously analyzed definitions of terrorism, Martha Crenshaw defines terrorism in her 1990 chapter “Questions, research, and knowledge” more similarly to the above definitions of social movements than to the earlier presented definitions of terrorism. She states “terrorism is not...the action of an individual. Acts of terrorism are committed by groups who reach collective decisions based on commonly held beliefs, although the level of individual commitment to a group and its beliefs varies. It is a political act performed by individuals acting together and collectively trying to justify their behavior.”¹³⁹ Crenshaw leaves out notions of both violence and the production of fear among the targeted population and focuses primarily on the socio-psychological aspects of terrorism just as the definitions of social movements do not require these elements. Crenshaw does include the notion of terrorism as a political act, which is consistent with Schmid and Jongman, Hoffman, and Wardlaw’s definitions.

This brief review of definitions of social movements may lead us to conjecture that some groups were relieved of the “undesigned terrorist organization” determination via categorical exemptions because they qualified, alternatively or more broadly, as social or political movements more so than as organized perpetrators of terrorism. Such a reclassification would not absolve the groups of violence or even of terrorist activity, but would point to the breadth of the Tier III definition in classifying groups.

¹³⁹ Crenshaw, Martha. 1990. “Questions to be answered, research to be done, knowledge to be applied.” In *Origins of Terrorism: Psychologies, ideologies, theologies, states of mind*, ed. Walter Reich. New York: Cambridge University Press.